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No. 04-

IN THE

# Supreme Court of the United States

John Melvin Alexander, *et al.*,
*Petitioners*,

v.

State of Oklahoma, *et al.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. When a district court determines whether a claim is equitably tolled on a motion for summary judgment, and thus on undisputed facts, is that ruling reviewed (i) for abuse of discretion (as the Tenth Circuit and five other circuits hold), or instead (ii) de novo (as six circuits hold)?

2. May a plaintiff's claim accrue under federal law despite the fact that she neither knew nor should have known of particular defendants' responsibility for her injury, as four circuits hold in conflict with four other circuits?

## PARTIES TO THE PROCEEDING BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners here: Juanita Delores Burnett Arnold; J. B. Bates; Essie Lee Johnson Beck; James D. Bell; Phines Bell; Frances Blackwell; Juanita Williams Blakely; Juanita Smith Booker; Kinney Booker; Dorothey Booker Boulding; Jeanette McNeal Bradshaw; Teresa Earlee Bridges Dysart; Johnnie L. Grayson Brown; Lee Ella Strozier Brown; Clarence Bruner; Lula Belle Lacy Bullock; Joe R. Burns; Rose L. Green Bynum; Muriel Mignon Lilly Cabell; Beatrice Campbell-Webster; James Dale Carter; Rosella Carter; Samuel Cassius; Naomi Hooker Chamberlain; Mildred Mitchell Christopher; Mildred Lucas Clark; Otis Granville Clark; Sandy Clark; Blanche Chatman Cole; Wordie "Peaches" Miller Cooper; Carrie Humphrey Cudjoe; Laverne Cooksey Davis; Dolly Mae Daufitt; James Durant; Lucille B. Buchanan Figures; Archie Jackson Franklin; Jimmie Lilly Franklin; Joan Hill Gambrel; Earnestine Gibbs; Harold Gibbs; Theressa Cornella McNeal Gilliam; Edward L. Givens; Bertha Guyton; Hazel Franklin Hackett; Mildred Johnson Hall; Nell Hamilton Hampton; Leroy Leon Hatcher; Madeline Haynes; Joyce Walker Hill; Robert Holloway; Dr. Olivia J. Hooker; Samuel J. Hooker, Jr.; Wilhelmina Guess Howell; Charles Hughes; Myrtle Wells Hurd; Vera Ingram; Eunice Cloman Jackson; Genevieve Elizabeth Tillman Jackson; Willie Bell White Jackson; Dr. Hobart Jarrett; Artie Lacy Johnson; Wilma Mitchell Johnson; Edward Earven Jones; Hazel Dolores Smith Jones; Julia Bonton Jones; Percy Jones; Thelma Thurman Knight; Leanna Johnson Lewis; Katie Mae Johnson Livingston; Alice Higgs Lollis; Roanna Henry McClure; Eldoris Mae Ector McCondichie; Carol Smitherman Martin; Mary Tacoma Maupin; Willie Musgrove Means; Ishmael S. Moran; Ruth Dean Nash; Simeon L. Neal; Almadge J. Newkirk; Myrtle Napier Oliver; Juanita Maxine Scott Parry; Ida Burns Patterson; Freddie Scott Payne; June Alexander Powdrill; Alice Presley; Delois Vaden Ramsey; Cora Hawkins Renfro; Simon R. Richardson; Jewel Smitherman Rogers; Gerlene Helen

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In addition to the State of Oklahoma, which is named in the caption, the following parties appeared below and are respondents here: the City of Tulsa, the Chief of Police of Tulsa (in his official capacity), the City of Tulsa Police Department, and Does 1-100.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners John Melvin Alexander, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW AND JURISDICTION

The opinion of the district court (Pet. App. 18a-41a) is unpublished. The opinion of the Tenth Circuit (*id.* 1a-17a) is published at 382 F.3d 1206 (2004). The Tenth Circuit's denial of rehearing en banc and accompanying dissenting opinion (*id.* 42a-54a) are published at 391 F.3d 1155. The court of appeals issued its opinion on September 8, 2004, and denied rehearing on December 13, 2004. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

## STATEMENT

At issue in this case is whether the City of Tulsa and the State of Oklahoma will be held accountable for the grave injuries they inflicted during the Tulsa Race Riot of 1921, one of the worst race riots in American history. Although the Riot left hundreds of African-Americans dead and forty-two square blocks of Greenwood – Tulsa's African-American neighborhood – burned to the ground, neither the City nor the State has ever taken any action to rectify the injuries they caused. Petitioners, who are survivors of the Riot and descendants of its victims, filed this action after a state commission formed to study the Riot published a report that – for the first time – documented the extensive involvement of state actors in the Riot. The district court dismissed petitioners' action as untimely, and the court of appeals affirmed.

1. In 1921, Greenwood was one of the most prosperous African-American communities in the United States. Serving over 8000 residents, Greenwood's commercial district was known nationally as the "Negro Wall Street." The community boasted two newspapers, over a dozen churches, and many African-American-owned businesses. Second Am. Compl. ¶¶ 445-53.

On May 31, 1921, Tulsa authorities arrested Dick Rowland, a young African-American, for allegedly assaulting a white elevator operator, charges that would later be dropped. A white mob gathered outside the courthouse where Mr. Rowland was jailed, and rumors of a lynching began to circulate. Knowing that local authorities had failed to prevent lynchings in the past, a group of African-American men went to the courthouse in an effort to protect Mr. Rowland. When a white man attempted to take a gun from one member of that group, a shot rang out and the Tulsa Race Riot began. Pet. App. 22a.

In the midst of a gun battle, the African-American men – who were vastly outnumbered by the white mob – retreated to Greenwood. Second Am. Compl. ¶ 465. All through the night and into the morning of June 1, 1921, a white mob ransacked Greenwood, shooting indiscriminately at African-Americans and burning almost every building in the community. Pet. App. 2a. Not only did the State and City fail to stop the destruction, but state and local officials participated in the violence and deputized and armed members of the white mob. *Id.* 3a-4a.

The Tulsa police chief deputized between 250 and 500 men, commandeering local gun shops and pawnshops in order to arm the new deputies. The police department ordered members of the mob to "go home, get a gun, and get a nigger." Second Am. Compl. ¶¶ 470-71. When the State National Guard arrived to assist the police, the guardsmen joined in the destruction and fired at will at African-American Greenwood residents. *Id.* ¶¶ 472-73, 481, 490.

As many as three hundred African-Americans were killed in the Riot, and over twelve hundred homes were destroyed (leaving most residents homeless). Every church, school, and business in Greenwood was set on fire.

2. Shortly after the Riot, the State convened a grand jury to determine its cause. The grand jury officially placed re-

sponsibility for the violence squarely on members of Greenwood's African-American community:

> [T]he recent race riot was the direct result of an effort on the part of a certain group of colored men * * *. [T]here was no mob spirit among the whites, no talk of lynching and no arms. The assembly was quiet until the arrival of the armed negroes which precipitated and was the direct cause of the entire affair * * *. [T]here existed indirect causes * * * [among which] were agitation among the negroes of social equality * * * which led them as a people to believe in equal rights, social equality, and their ability to demand the same.

Pet. C.A. Br. 6 (quoting Grand Jury Report). The grand jury indicted several African-American men for their alleged roles in the Riot, but no such indictments were ever issued for any white person. Newspapers and civic organizations joined the grand jury in heaping blame upon Greenwood residents. The Tulsa Tribune wrote:

> Such a district as the old "Niggertown" must never be allowed in Tulsa again * * *. In this old "Niggertown" were a lot of bad niggers and a bad nigger is about the lowest thing that walks on two feet * * * . Well, the bad niggers started it.

*Ibid.* (quoting the Tulsa Tribune, June 4, 1921).

Although over one hundred Greenwood residents and property owners filed lawsuits in an effort to recover damages from insurance companies, "[n]ot one of those suits was successful." Tulsa Race Riot: A Report By The Oklahoma Commission To Study The Tulsa Race Riot Of 1921, at 166-67 (Feb. 28, 2001) [hereinafter "Commission Report"], *available at* www.ok-history.mus.ok.us/trrc/freport.pdf. The City of Tulsa declined the myriad offers of private aid that flowed in from around the country, insisting that "Tulsa feels equal to the task of its own restitution." Pet. C.A. Br. 8 (quoting report in the Tulsa Tribune, June 3, 1921). Such promises were

hollow: the city provided no assistance in rebuilding Greenwood, and the victims of the Riot were left to rebuild their lives with their few remaining resources. *Ibid.* In addition, "local officials attempted to block the rebuilding of the Greenwood community by amending the Tulsa building code." Pet. App. 26a. Thousands spent the winter following the Riot living in tents, as they had been unable to build more permanent shelter. Commission Report 88-89. Thousands more fled Tulsa permanently. Pet. C.A. Br. 7.

The City and State quickly took steps to sweep the Riot "beneath history's carpet." Pet. App. 26a. Victims were buried in unmarked graves, neither the State nor the City undertook any investigations or prosecutions, and documents relating to the Riot vanished from state archives. Pet. C.A. Br. 8-9. The government's effort to eliminate memory of the Riot was so successful that the current mayor of Tulsa, Bill LaFortune, remarked in 1996, "I was born and raised here, and I had never heard of the riot." Pet. C.A. Br. 9. "Until recently, the Tulsa race riot has been the most important least known event in [Oklahoma's] entire history. Even the most resourceful of scholars stumbled as they neared it * * *." Commission Report 6.

3. The government's efforts to maintain this conspiracy of silence regarding the Riot lasted for seventy-five years – beyond the end of the Jim Crow era and the 1982 publication of Scott Ellsworth's book about the Riot, *Death in a Promised Land*. It was not until 1997 that the Oklahoma Legislature created a Commission to study the Riot. And the truth was not known until February 28, 2001, when – after four years of intense study and unprecedented efforts to gather new evidence – the Commission published its findings. The Commission's Report details the difficulty that Commission members and staff encountered in assembling evidence that revealed a fuller picture of what happened during the Riot: "As its work grew steadily more exacting and steadily more specialized, the commission turned to more experts [including] [l]egal scholars, archeologists, anthropologists, forensic

specialists, geophysicists." Pet. C.A. Br. 10 (quoting Dr. Scott Ellsworth, primary author of the report). Moreover, the report contained significant amounts of new evidence: "To write this report, Scott Ellsworth used evidence he did not have — no one had it — as recently as 1982. He cites that new evidence at least 148 times." Commission Report 8. The new Report made clear for the first time the extensive involvement of the State and City in the prosecution of the Riot. *Id.* at 11-12.

The Oklahoma Legislature adopted many of the Report's findings: "Perhaps the most repugnant fact regarding the history of the 1921 Tulsa Race Riot is that it was virtually forgotten * * *. This 'conspiracy of silence' served the dominant interests of the state during that period which found the riot a 'public relations nightmare' that was 'best to be forgotten * * *.'" Pet. App. 26a (quoting the Oklahoma Legislature's findings). In addition, the State acknowledged for the first time "that there were moral responsibilities at the time of the riot which were ignored and have been ignored ever since * * *." *Id.* 27a.

4. With the truth finally revealed, petitioners filed this suit against respondents – the Tulsa Police Department, the Tulsa Chief of Police, the City of Tulsa, and the State of Oklahoma. Pursuant to, inter alia, 42 U.S.C. 1981, 1983, and 1985, petitioners sought damages for the injuries that they sustained in the Riot as a result of the government's involvement. Respondents moved to dismiss.[1]

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[1] Respondents also sought sanctions against the petitioners for bringing the suit. The district court tersely rejected respondents' request, admonishing respondents that "the filing of the motion for sanctions is more troubling than the filing of the Complaint" and emphasizing that the request for sanctions "only fuels the belief that the State and City are ignoring their moral responsibility for the Riot." Pet. App. 40a. The district court chastised "[t]he contentious attitude" of respondents as "destructive and wasteful of judicial resources." *Ibid.*

The district court granted respondents' motions to dismiss, holding that Oklahoma's two-year statute of limitations barred petitioners from bringing their claims. Pet. App. 40a. Although petitioners advanced multiple theories as to why their claims were not time-barred, the district court considered these arguments collectively: "Regardless of the legal theory relied on, equitable estoppel, equitable tolling, or accrual, the gravamen of Plaintiffs' argument is that they did not and could not know of the City's involvement [in the Riot] any sooner." *Id.* 35a.

The district court rejected petitioners' contention that they could not have immediately known of the government's role in the Riot, and did not in fact know of that role until the Commission issued its report in 2001 and the government finally abandoned its false official stance that it bore no responsibility. In particular, the district court concluded that the allegations of petitioners' complaint demonstrated both that the victims of the Riot would have observed the government's role in the Riot and that some victims did in fact file lawsuits against the government shortly after the Riot. Pet. App. 35a.

The district court accepted, however, petitioners' argument that their case presented exceptional circumstances warranting the equitable tolling of the statute of limitations. Noting "the horror and devastation of the riot as well as the intimidation, misrepresentation and denial that took place afterward," the court found that "[t]he political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights." *Id.* 37a. The court also acknowledged that "intimidation, fear of a repeat of the Riot, inequities in the justice system, Klan domination in the courts, and the era of Jim Crow" constituted extraordinary circumstances that also required equitable tolling. *Id.* 37a. Yet the court ignored the continued "conspiracy of silence" that made attempts at legal redress futile prior to 2001, instead concluding that the statute ceased to toll at some unidentified point between the Riot and the present day. Relying on expert testimony that "the Jim Crow era ended in

the 1960's," the district court stated flatly that "[none] of the other exceptional circumstances continued until the Commission Report was published." *Ibid.*[2]

5. The Tenth Circuit affirmed. First, the court of appeals held that the district court had properly converted the defendants' motion to dismiss to a motion for summary judgment. See Pet. App. 5a-8a. Addressing the substance of petitioners' claims, the court of appeals first considered the district court's conclusion that those claims had accrued shortly after the Riot. The Tenth Circuit explained that, under its settled precedent, "[a] civil rights action accrues when facts that would support a cause of action are or should be apparent." Pet. App. 9a (alteration in original) (quoting *Fratus* v. *Deland*, 49 F.3d 673, 675 (CA10 1995)) (internal quotation marks omitted). Under this rule, the court explained, "a plaintiff need not have conclusive evidence of the *cause* of an injury in order to trigger the statute of limitations." *Id.* 10a (citing *Baker* v. *Bd. of Regents of the State of Kansas*, 991 F.2d 628, 632 (CA10 1993) (emphasis added)). Instead, the relevant question is whether "the plaintiff knew of facts that would put a reasonable person on notice that *wrongful conduct* caused the harm," without regard to the particular party responsible. *Ibid.* (emphasis added). Because petitioners' "injuries and *the general cause* of those injuries were obvious

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[2] Petitioners subsequently sought to amend their complaint to add an *Ex Parte Young* claim seeking injunctive and declaratory relief against the Governor of Oklahoma – a form of relief that would not be precluded by sovereign immunity. The district court indicated that such an amendment "would normally be allowed at this relatively early stage of litigation" but deemed the issue "moot" based on its conclusion that petitioners' claims were barred by the statute of limitations. Pet. App. 39a. Petitioners challenged this ruling in the Tenth Circuit. See Pet. C.A. Br. 51-52. Thus, if this Court grants certiorari and reverses the statute of limitations holding, petitioners will almost certainly have a live *Ex Parte Young* claim against the Governor.

in the aftermath of the Riot," *id.* 11a (emphasis added), the court found that petitioners' claims had accrued in 1921 immediately after the Riot: "To start the running of the statute of limitations, our case law requires nothing more." *Ibid.*

The Tenth Circuit then turned to the district court's holding that the "extraordinary circumstances" justifying equitable tolling had "dissipated substantially by the 1960s." Pet. App. 11a. The court of appeals reviewed that determination for abuse of discretion, rather than *de novo*. The panel explained that under its well-settled precedent, absent "a definite and firm conviction that [it] has made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances," circuit precedent required it to affirm the district court. *Ibid.* (alteration in original) (quoting *Beaird* v. *Seagate Technologies, Inc.*, 145 F.3d 1159, 1164 (CA10 1998) (quoting, in turn, *McEwen* v. *City of Norman*, 926 F.2d 1539, 1553-54 (CA10 1991))) (internal quotation marks omitted). Although the court of appeals agreed that "in the immediate aftermath of the Riot and for several decades thereafter, extraordinary circumstances justified tolling the statute of limitations," *id.* 16a, it deferred to the district court's determination that petitioners "could have brought this action at some unspecified point prior to 2001," *id.* 11a.

Over the dissenting votes of four judges, the Tenth Circuit denied rehearing en banc. See Pet. App. 41a. Judge Lucero's dissent described petitioners' case as "presenting a 'question of exceptional importance.'" See *id.* 43a-57a. The dissenters emphasized that all previous lawsuits arising out of the 1921 Riot "fell upon the deaf ears of the courts at the time." *Id.* 43a. Notably, the dissenting judges would have held that the district court's equitable tolling holding failed even abuse of discretion review. *Id.* 52a-53a. Moreover, the dissenters noted, the court of appeals had compounded its error "by concluding that 'evidence suggesting the City and State's involvement in the Riot was available in its immediate aftermath and, at the very least, upon publication of *Death In A Promised Land* in 1982.'" The dissenters concluded that

the availability of facts about the government's involvement did not adequately respond to the extraordinary obstacles that petitioners faced, and they concluded that the district court had abused its discretion by failing to hold that "extraordinary circumstance[s] * * * persisted until the Commission filed its report." *Id.* 50a.

This petition followed.

## REASONS FOR GRANTING THE WRIT

### I. Certiorari Is Warranted In This Case To Resolve The Circuit Conflict Perpetuated By The Tenth Circuit's Erroneous Holding That The District Court's Equitable Tolling Ruling Is Reviewed For An Abuse Of Discretion, Not De Novo.

The first question presented by this case is the appropriate standard of review of a district court's application of equitable tolling. The courts of appeals have adopted three irreconcilable approaches to that question, and it is plain that the conflict cannot be resolved without this Court's intervention. The question is moreover of manifest importance. It arises frequently in civil litigation because equitable tolling claims are often resolved on summary judgment, and the standard of review is often outcome determinative on appeal. This case presents the Court with an ideal vehicle to resolve this question, which was squarely decided below. Finally, certiorari is warranted because the Tenth Circuit's holding that an abuse of discretion standard applies is wrong on the merits: *de novo* review is the appropriate standard when, as here, the question is purely the application of law to undisputed facts.

#### A. The Circuits Are Irreconcilably Divided Over the Standard of Review for Application of Equitable Tolling.

1. As the courts of appeals have repeatedly recognized, there is a conflict among the circuits over the appropriate standard of review of a district court's holding that a statute of limitations should or should not be equitably tolled. See

*Rouse* v. *Lee*, 339 F.3d 238, 247 nn.7 & 9 (CA4 2003) (en banc) ("The other circuits are divided on the proper standard of review * * *."), cert. denied, 124 S. Ct. 1605 (2004); *Jihad* v. *Hvass*, 267 F.3d 803, 806 n.3 (CA8 2001) ("Our sister circuits are not on accord on the issue."); *Neverson* v. *Farquharson*, 366 F.3d 32, 42 n.11 (CA1 2004) ("[T]he courts of appeal disagree over the standard of review * * *."). There are three irreconcilable standards: *de novo*; an intermediate standard that uses *de novo* review when the facts are undisputed or the issue was decided as a matter of law; and abuse of discretion.

a. The Tenth Circuit applies a categorical rule that all equitable tolling cases are reviewed under an abuse of discretion standard. The court of appeals recognized that the question before it was "whether the District Court abused its discretion in finding, based on undisputed evidence," that equitable tolling was inappropriate. Pet. App. 15a. The panel thus acknowledged that the underlying *historical* facts of petitioners' case were necessarily undisputed, as the case had been resolved on summary judgment. See *id.* 8a, 15a; *id.* 16a ("Rather, the judgment must stand if, based on the undisputed facts available, those [extraordinary] circumstances ended sometime prior to February 2001."); *id.* 37a (district court) ("The question is not a factual question of whether exceptional circumstances existed. They did. It is a legal question of the effect, with respect to the issue of statute of limitations, of those exceptional circumstances."); see also 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2712 (3d ed. 2004) (summary judgment is appropriate only when there is no genuine dispute regarding any material fact). Yet, it then proceeded to "review the district court's refusal to apply equitable tolling" to those undisputed facts "for an abuse of discretion." Pet. App. 9a (quoting *Garrett* v. *L.E. Fleming*, 362 F.3d 692, 695 (CA10 2004)) (internal quotation marks omitted). The district court's ruling here was that, although a lawsuit against the City and State would have been futile for more than forty years after the Riot, a jury

would necessarily have found that the extraordinary circumstances vanished at some point during the 1960s, at which time the elderly survivors of the Riot should have known to file their suit, without any positive developments having occurred in the interim that might have given petitioners any reason to doubt that a suit would still be futile. Despite this counterintuitive conclusion about what a jury would necessarily have concluded, the court of appeals nonetheless applied its deferential abuse of discretion standard.

Consistent with the Tenth Circuit's holding, five other circuits – the First, Second, Fourth, Fifth, and Seventh – apply the same categorical abuse of discretion standard, even in cases with undisputed facts. See, *e.g.*, *Neverson*, 366 F.3d at 42; *Zerilli-Edelglass* v. *New York City Transit Auth.*, 333 F.3d 74, 81 (CA2 2003); *Rouse*, 339 F.3d at 247 n.6; *Fierro* v. *Cockrell*, 294 F.3d 674, 679 (CA5 2002); *Clark* v. *Runyon*, 116 F.3d 275, 277 (CA7 1997).

b. By contrast, at least five circuits – the Sixth, Eighth,[3] Ninth, District of Columbia, and Federal – employ an intermediate approach, using a *de novo* standard of review in cases in which (as here) the facts underlying the equitable tolling claim are undisputed or the district court made its determination as a matter of law. See, *e.g.*, *Dunlap* v. *United States*, 250 F.3d 1001, 1007 (CA6 2001) ("We review *de novo* the district court's decision not to apply the doctrine of equitable tolling inasmuch as the facts in this case are undisputed and the district court determined as a matter of law that there were no grounds that would justify equitable tolling in Petitioner's case."); *Jihad*, 267 F.3d at 806 n.3 ("Because the [district] court appeared to treat equitable tolling as an issue of law, we have reviewed its ruling *de novo*."); *Miles* v. *Prunty*, 187 F.3d

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[3] The Eighth Circuit has held that *de novo* review is appropriate when there are no findings of fact and the issue was decided as a matter of law. *Jihad*, 267 F.3d at 806 n.3. It has not yet definitively determined the appropriate standard when the facts are disputed.

1104, 1105 (CA9 1999) ("[W]here, as here, the facts are undisputed as to the question of equitable tolling, we review de novo * * * ."); *United States* v. *Saro*, 252 F.3d 449, 455 n.9 (CADC 2001) ("[W]e employ de novo review when a district court holds – as the court appears to have done here – that the facts cannot justify equitable tolling as a matter of law."); *Former Employees of Sonoco Prods. Co.* v. *Chao*, 372 F.3d 1291, 1295 (CAFC 2004) ("Thus, cases falling in the middle of the spectrum, requiring application of the appropriate standard to undisputed facts, are properly questions of law reviewed de novo by this court.").

c. Finally, the Eleventh Circuit has adopted yet a third rule: that court applies a *de novo* standard in all equitable tolling cases. See, *e.g.*, *Helton* v. *Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1312 (2001) ("We review the district court's application of equitable tolling *de novo*, as the question is 'solely one of law.'" (quoting *Sandvik* v. *United States*, 177 F.3d 1269, 1271 (CA11 1999))). It applies *de novo* review even when the facts underlying equitable tolling are disputed. See, *e.g.*, *Miranda* v. *B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531-32 (1992) (employing *de novo* standard despite dispute over whether the defendant misled the plaintiff into believing it would correct the problem).

2. Only this Court can resolve this entrenched conflict. First, although the courts of appeals have been presented with numerous opportunities to resolve the conflict themselves, they have repeatedly refused to do so. For example, the Eleventh Circuit denied rehearing en banc in a case in which the panel had vacated its original opinion, which had used an abuse of discretion standard of review, and replaced it with an opinion using a *de novo* standard. See *Helton* v. *Sec'y for Dep't of Corr.*, 233 F.3d 1322, 1325 (2000) (employing abuse of discretion standard), opinion superseded by *Helton* v. *Sec'y for Dep't of Corr.*, 259 F.3d 1310, 1311-12 (2001) (adopting a de novo standard of review); *Helton* v. *Sec'y for Dep't of Corr.*, 275 F.3d 49, 49 (2001) (denying rehearing en banc). Other circuits have similarly rejected excellent opportunities

to resolve the issue en banc. See, *e.g.*, *Former Employees of Sonoco Prods., Co.*, 372 F.3d at 1294-96 (standard considered at length by panel); *Saro*, 252 F.3d at 455 n.9; *Zerilli-Edelglass*, 333 F.3d at 81 n.7 (noting that in light of prior precedent indicating that standard was *de novo*, panel circulated draft opinion applying abuse of discretion standard to all active judges, none of whom requested rehearing en banc). Moreover, two circuits – the Fourth and First – have adopted abuse of discretion standards after expressly recognizing the divergent positions of other circuits. *Rouse*, 339 F.3d at 247 nn.6 & 7; *Neverson*, 366 F.3d at 42 & n.11 (citing *Rouse*).

Furthermore, this division among the circuits is long-standing. The Ninth Circuit has employed the intermediate standard of review – using *de novo* review in cases involving undisputed facts – for almost twenty years. See *Valenzuela* v. *Kraft, Inc.*, 801 F.2d 1170, 1172 (1986). The Eleventh Circuit has used a *de novo* standard in all equitable tolling cases for over twelve years, see, *e.g.*, *Miranda*, 975 F.2d at 1531, while the First Circuit has effectively employed the abuse of discretion standard since 1992, see *Jimenez* v. *Peninsular & Oriental Steam Navigation Co.*, 974 F.2d 221, 226 n.10 (1992) (citing "plain error" standard in declining to allow equitable tolling). Accordingly, only this Court can bring needed uniformity to this recurring question of federal law.

3. Certiorari should be granted for the further reason that the question presented is outcome determinative in a substantial body of civil litigation. As this Court has repeatedly recognized, the standard of review is frequently dispositive; this Court has accordingly granted certiorari in numerous cases presenting disputes over the standard of review, and has reversed or vacated and remanded when the court below has used the wrong standard. See, *e.g.*, *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 431, 441 (2001); *Ornelas* v. *United States*, 517 U.S. 690, 695, 700 (1996); *Koon* v. *United States*, 518 U.S. 81, 91, 100 (1996); *Denton* v. *Hernandez*, 504 U.S. 25, 33 (1992). In some of these cases, the circuit conflict at issue was far less developed than it is

here, yet the Court deemed certiorari appropriate. See Resp. BIO to Pet. for Cert. 9, *Cooper Indus.* (No. 99-2035) (noting that no circuit had acknowledged the conflict); Pet. for Cert. 15-16, *Koon* v. *United States* (No. 94-1664) (conflict involved only three circuits).

The standard of review has also proven outcome determinative in equitable tolling cases in particular. For example, in *Helton*, Eleventh Circuit precedent dictated that the panel should have reviewed *de novo* the district court's determination to apply equitable tolling in light of attorney miscalculations and deficiencies in the prison library system. In its original opinion, the panel nonetheless applied the "abuse of discretion" standard and affirmed, see 233 F.3d at 1325, but on rehearing it correctly applied the *de novo* standard of review and reversed, concluding that the case did not present extraordinary circumstances that warranted equitable tolling. *Helton*, 259 F.3d at 1313. Similarly, in *Miller* v. *Collins*, 305 F.3d 491, 495-96 (2002), the Sixth Circuit applied *de novo* review to undisputed facts and reversed the district court's refusal to invoke equitable tolling because it concluded that it was not unreasonable for the petitioner to wait nine months for a state court judgment before proceeding with a federal action. Under an abuse of discretion standard, the court of appeals likely would have deferred to the district court's conclusion that this delay was unreasonable and upheld the denial of equitable tolling.

4. The conflict over the standard of review is furthermore intolerable because of the importance of equitable tolling in modern litigation. Every year, the federal courts consider a vast number of cases seeking equitable tolling. Indeed, over the last two years alone, the courts of appeals have addressed the issue in over 350 cases and have explicitly discussed the standard of review in roughly 70 of them. In the past two years, equitable tolling claims have been presented to all thirteen circuits, with eleven expressly addressing the standard of review. The vast majority of these cases implicate the core of the circuit split because the equitable tolling

issue is decided at the motion to dismiss or summary judgment stage, and the facts are therefore undisputed.

Moreover, the importance of the issue presented is reflected by the extraordinary breadth of the contexts in which it regularly arises. See, *e.g.*, *Weigel* v. *Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 376 (CA6 2002) (ADEA); *Santa Maria* v. *Pacific Bell*, 202 F.3d 1170, 1175-76 (CA9 2000) (ADA); *Garrett* v. *Fleming*, 362 F.3d 692, 695 (CA10 2004) (*Bivens* action); *United States* v. *All Funds Distributed to, or on Behalf of, Weiss*, 345 F.3d 49, 54 (CA2 2003) (civil forfeiture); *Maurizio* v. *Goldsmith*, 230 F.3d 518, 520 (CA2 2000) (copyright); *Fisher* v. *Johnson*, 174 F.3d 710, 713 (CA5 1999) (habeas corpus); *Arnold* v. *Air Midwest, Inc.*, 100 F.3d 857, 861 (CA10 1996) (labor law); *Chung* v. *United States Dep't of Justice*, 333 F.3d 273, 279 (CADC 2003) (Privacy Act); *Smith* v. *Pennington*, 352 F.3d 884, 892 (CA4 2003) (securities); *Azer* v. *Connell*, 306 F.3d 930, 936 (CA9 2002) (Section 1983); *Johnson* v. *Henderson*, 314 F.3d 409, 413-14 (CA9 2002) (sexual harassment); *Teemac* v. *Henderson*, 298 F.3d 452, 457 (CA5 2002) (Title VII); *Justice* v. *United States*, 6 F.3d 1474, 1478 (CA11 1993) (tort); *Romagoza Arce* v. *Garcia*, No. 02-14427, 2005 U.S. App. LEXIS 3505 (CA11 Feb. 28, 2005) (Torture Victim Protection Act and Alien Tort Claims Act).

### B. This Case Presents the Ideal Vehicle for Resolving This Important Circuit Conflict.

The present case is an ideal vehicle for the Court to resolve the question presented because the decision below directly addressed the standard of review, Pet. App. 8a, and rejected petitioners' assertion that the denial of equitable tolling was "a pure question of law, reviewed *de novo*." Pet. C.A. Br. 14-15. Based on its past practice, the Court will likely decide the appropriate standard of review, then (if it agreed with petitioners that *de novo* review was appropriate) remand the case to the Tenth Circuit for further proceedings under that standard. See *Cooper Industries*, 532 U.S. at 444 (vacat-

ing and remanding to apply *de novo* review); *Ornelas*, 517 U.S. at 700 (same); *Denton*, 504 U.S. at 35 (vacating and remanding to apply abuse of discretion review). Nonetheless, it is worth recognizing that the facts of this case as it comes to the Court illustrate the importance of the standard of review. A less deferential review by the Tenth Circuit likely would have led to reversal. The court merely held that "the District Court did not abuse its discretion," Pet. App. 15a, not (as respondents had principally argued) that the district court was right on the merits. And it moreover repeatedly reiterated its reliance on that Circuit's lenient standard of review. See *id.* 8a; *id.* 11a; *id.* 15a; *id.* 17a. Further, because four judges voted to rehear the case en banc, with two judges explicitly indicating that they would have reversed *even under an abuse of discretion standard*, *id.* 44a (Lucero, J., dissenting from denial of rehearing en banc) ("The trial court abused its discretion * * * [by] incorrectly finding that equitable tolling had lifted at some unspecified point in the past."), application of a *de novo* standard likely would have changed the outcome of the case.

Specifically, application of *de novo* review would compel reversal because the district court made a number of unwarranted assumptions to which the Tenth Circuit deferred. In particular, although the district court held that extraordinary circumstances justifying equitable tolling existed in the wake of the Tulsa Race Riot, it concluded – apparently *as a matter of law* – that a jury would have been required to find that the extraordinary circumstances dissipated at some unspecified point in the 1960s, and that petitioners should have known at that time that their suit somehow ceased to be futile. Pet. App. 37a.

That holding is insupportable. In fact, it is undisputed that the City of Tulsa and the State of Oklahoma denied their involvement in directing and organizing the Riot until the Commission's report in 2001. This denial primarily took the form of a grand jury report that blamed the uprising on the African-American residents of Greenwood. It is further un-

disputed that the state and city participated in a "conspiracy of silence" for over seventy-five years in an effort to sweep the Riot "well beneath history's carpet." Pet. App. 26a (quoting the Oklahoma Legislature's findings). The district court rejected the argument that "the *official* denials of government culpability and *official* pronouncements that the African-American community was to blame" that "would have fatally tainted any lawsuit" were extraordinary circumstances that persisted until "the first and only *official* reversal of those positions" in the 2001 Commission Report. Pet. App. 50a (Lucero, J., dissenting from denial of rehearing en banc) (emphasis in original). Instead, the district court reached the erroneous conclusion that a jury could only have found that the extraordinary circumstances that existed for decades in the wake of the Riot – circumstances that, according to the district court, did prevent any realistic opportunity for petitioners to obtain legal relief – somehow unquestionably evaporated at some point during the 1960s. *Id.* 37a.

Even though the district court's decision was a legal judgment based on undisputed facts, the court of appeals undertook only a perfunctory review of the district court's reasoning. Rather than analyzing whether "the continued renunciation of government culpability by those in power created an impenetrable barrier to justice" that could be classified as extraordinary, Pet. App. 49a (Lucero, J., dissenting from denial of rehearing en banc), the court of appeals held that "the District Court did not abuse its discretion in holding that the exceptional circumstances which tolled the statute of limitations immediately after the Riot had dissipated sufficiently to trigger running of the statute at some point prior to 2001." Pet. App. 17a. Thus, in this case, as in *Cooper Industries*, "it does seem likely that * * * a thorough, independent review of the District Court's [decision] * * * might well have led the Court of Appeals to reach a different result" because of "a series of questionable conclusions by the District Court that may not survive de novo review." 532 U.S. at 441.

### C. *De Novo* Review Is the Correct Standard for Reviewing the Application of Equitable Tolling to Undisputed Facts.

Certiorari is moreover warranted because the decision below was wrong on the merits: *de novo* review is the correct standard of review in cases involving the application of equitable tolling to undisputed facts. The Tenth Circuit's distinction between abuse of discretion review for summary judgment based on equitable tolling and *de novo* review for all other summary judgment decisions is unsound. Equitable tolling in this context is no different from any other summary judgment question: the court must decide whether a reasonable jury *could* conclude that the undisputed facts could reasonably meet the legal standard. Cf. *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 371 (1995) (stating that summary judgment would be appropriate if undisputed facts showed that a maritime worker could not meet the legal standard for seaman status); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) ("[T]he trial judge shall then grant summary judgment if there is no genuine issue as to any material fact and if the moving party is entitled to judgment as a matter of law."). The Tenth Circuit itself has acknowledged that summary judgment rulings are generally reviewed *de novo*, but without explanation it applies abuse of discretion review when a question of equitable tolling is presented. *Harms* v. *IRS*, 321 F.3d 1001, 1006 (2003), cert. denied, 540 U.S. 858 (2003).

The Tenth Circuit's application of abuse of discretion review specifically cannot be reconciled with this Court's precedent. This Court has squarely held that *de novo* appellate review is appropriate when, as here, "the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant legal] standard * * *." *Ornelas*, 517 U.S. at 696 (quoting *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n.19 (1982)) (whether facts meet legal standards of "reasonable suspicion" and "probable cause" reviewed *de novo*); see also *Cooper Indus-*

*tries*, 532 U.S. at 435-36 (whether facts justify legal conclusion of "grossly excessive" punitive damages reviewed *de novo*).

*De novo* review is also appropriate in light of the factors this Court considers in determining the appropriate standard of review. First, the exact meaning of the concept "extraordinary circumstances" cannot precisely be articulated because it is a "fluid concept[] that take[s] [its] substantive content from the particular context[] in which the standard[] [is] being assessed." *Cooper Industries*, 532 U.S. at 436 (quoting *Ornelas*, 517 U.S. at 695-96). Therefore, *de novo* review is necessary to unify precedent and stabilize equitable tolling law so as to "help[] to assure the uniform general treatment of similarly situated persons that is the essence of law itself." *Ibid.* (quoting *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring)); see also *Ornelas*, 517 U.S. at 697-98.

Second, the legal rules for equitable tolling "acquire content only through application" to the facts of particular cases. *Ornelas*, 517 U.S. at 697; *Cooper Industries*, 532 U.S. at 436. Giving substantial presumptive weight to the assessments of district judges would undermine the appellate courts' role as the primary "expositor[s] of law." *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985). Thus, independent review is necessary if the "appellate courts are to maintain control of, and to clarify, the legal principles." *Ornelas*, 517 U.S. at 697.

Third, *de novo* review is warranted because the district court is in no better position than the court of appeals to decide the equitable tolling question on undisputed facts. See *Miller*, 474 U.S. at 114; *Ornelas*, 517 U.S. at 701 (Scalia, J., dissenting). The equitable tolling determination in this circumstance depends on neither an evaluation of the credibility of the witnesses nor an inquiry into state of mind. *Miller*, 474 U.S. at 113-14, 116-17. Because the appellate judge is just as capable of determining whether a jury could find that "under the totality of the circumstances" the case is so extraordinary

as to justify equitable tolling, *id.* at 112, abuse of discretion review is not required.

Certiorari should accordingly be granted to resolve the appropriate standard for reviewing a district court's ruling on a claim of equitable tolling.

## II. Certiorari Is Warranted To Resolve The Circuit Conflict Over Whether A Claim May Accrue Under Federal Law Regardless of Whether Petitioners Knew Or Reasonably Could Have Known Of The Defendants' Responsibility For Their Injuries.

### A. The Tenth Circuit's Accrual Rule Broadens an Entrenched Circuit Conflict.

The Tenth Circuit held in this case that petitioners' claims accrued immediately after the Tulsa Riot in 1921 because they purportedly "knew of facts that would put a reasonable person on notice that wrongful *conduct* caused the harm." Pet. App. 10a (emphasis added) (citing *Baker* v. *Bd. of Regents of the State of Kansas*, 991 F.2d 628, 632 (CA10 1993)). The court ruled that it was sufficient that petitioners' *injuries* were "public and obvious," even if the responsible actors were not. See Pet. App. 10a & n.4. In so holding, the Tenth Circuit deemed it irrelevant as a matter of law that it could not fairly be said until 2001 – when the Commission released its report and the State's and City's previous denials finally gave way to an acceptance of responsibility – that petitioners knew of respondents' central role in the Riot and hence petitioners' injuries.[4]

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[4] Although the Tenth Circuit's opinion did address whether petitioners were aware that the government had some connection to the Riot, it did so only in the context of the question of equitable tolling. The court of appeals there addressed only the "narrow issue [of] * * * whether the District Court abused its discretion" in failing to toll the statute of limitations. See Pet. App. 15a. In the context of *accrual*, the Tenth Circuit deemed it entirely irrelevant that the petitioners did not know prior to 2001 of the government's

Thus, on the Tenth Circuit's view, it makes no difference whether the plaintiff knew or could have known of a particular defendant's relationship to the wrongful conduct. The Third, Fourth, and Ninth Circuits follow the same rule. See *Zeleznik* v. *United States*, 770 F.2d 20, 22-24 (CA3 1985); *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 742-43 (CA4 1990); *Gibson* v. *United States*, 781 F.2d 1334, 1344 (CA9 1986).

The Tenth Circuit's accrual rule conflicts with the holdings of other circuits that a claim against the government does not accrue when a plaintiff is aware of the existence and the source of his injury, but does not know the *government's* responsibility for that injury. The First, Fifth, Seventh, and Eleventh Circuits hold that a claim does not accrue until the plaintiffs knew or should have known of the government's relationship to their injuries. See *Skwira* v. *United States*, 344 F.3d 64, 77 (CA1 2003) (holding that "the proper subject of knowledge for accrual purposes * * * is (1) the fact of injury and (2) the injury's causal connection with the government"), cert. denied, 124 S. Ct. 2836 (2004); *Lavellee* v. *Listi*, 611 F.2d 1129, 1131 (CA5 1980) (holding that "a cause of action accrues * * * when the plaintiff is, or should be, aware of both the injury and its connection with the acts of defendant"); *Drazan* v. *United States*, 762 F.2d 56, 59 (CA7 1985) (Posner, J.) (holding that "the knowledge that is required to set the statute of limitations running is knowledge of the government cause"); *Diaz* v. *United States*, 165 F.3d 1337, 1340 (CA11 1999) (holding that "[t]he cause of which a federal tort claimant must have notice for the statute of limitations to begin to run is the cause that is in the government's control, not

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role in the Tulsa Riot. For its part, the district court found it telling that victims would have known that uniformed men had participated in the Riot, but the district court did not find – and certainly did not find it undisputed – that victims of the Riot knew or should have known that city and state officers were acting in their official capacity under the instructions of the respondents.

a concurrent but independent cause that would not lead anyone to suspect that the government had been responsible for the injury" (quoting *Drazan*, 762 F.2d at 59)).

2. This Court's intervention is required to resolve the conflict because, although the courts of appeals have repeatedly expressly acknowledged the circuit conflict regarding when a claim accrues, they have nonetheless been unwilling or unable to resolve this conflict on their own. See, *e.g.*, *Diaz*, 165 F.3d at 1340-41 (concluding that the "better rule" was to delay accrual until "the plaintiff knows, or exercising reasonable diligence should know, both of the [injury] and its causal connection *with the government*" (emphasis added); *Zeleznik*, 770 F.2d at 23.

In other cases, courts of appeals have deemed themselves bound by their own precedent, even when that precedent results in a standard that the court regards as inconsistent with the law of this Court. Thus, in *Gibson*, the Ninth Circuit recognized "the strategic importance to the litigant of knowing whom to sue" and conceded that Supreme Court precedent weighed in favor of a different rule for accrual. 781 F.2d at 1344 ("Language in [*United States* v. *Kubrick*, 444 U.S. 111, 122 (1979)] * * * supports plaintiffs' proposed construction" that a claim does not accrue until the plaintiff has knowledge of the government's responsibility for the injury). Yet because it felt constrained by its own precedent, the Ninth Circuit nevertheless held that notice of injury alone was sufficient to trigger the statute of limitations. *See ibid.* ("[B]inding circuit precedent forecloses us from considering such an extension of *Kubrick*." (citing *Dyniewicz* v. *United States*, 742 F.2d 484 (CA9 1984))).

### B. Petitioners' Constitutional Claims Did Not Accrue Until They Were Able to Learn of State Actors' Connection to Their Injuries.

Certiorari is also warranted because the decision below is wrong on the merits. When a plaintiff is blamelessly unaware of a defendant's involvement in the events causing the harm,

that plaintiff's claims do not accrue until she could have, with reasonable diligence, learned of the defendant's role. That is particularly true when, as here, the defendant has resolutely denied responsibility and officially blamed the victims. Given the lack of information available to petitioners at the time of the Riot, the court of appeals should have held that their Section 1983 and constitutional claims accrued when they knew or should have known of state actors' involvement in the Riot, as both this Court's precedents and principles of justice mandate that constitutional claims do not accrue until a plaintiff should know that the defendant caused the harm at issue.

It is well established that a federal claim does not accrue until the injured plaintiff is able to learn the identity of the party who caused the harm. This Court has been careful to distinguish between the defendant's role in the harm and the defendant's negligence – while a plaintiff must have knowledge of the former, evidence of the latter is not essential for a claim to accrue. Thus, in *Kubrick*, which involved a medical malpractice suit brought under the Federal Tort Claims Act, this Court held that a federal claim accrues when the plaintiff knows of his injury and possesses information about the cause of that injury. 444 U.S. at 122. In describing these requirements, this Court noted that "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and *who has inflicted the injury*. He is no longer at the mercy of the latter." *Ibid.* (emphasis added). This Court's commonsense reasoning in *Kubrick* dictates that a claim does not accrue when a plaintiff is unable to obtain the "critical fact" of the defendant's identity.[5]

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[5] In *Kubrick*, a medical patient had knowledge that a doctor's decision to administer an antibiotic led to his loss of hearing, but was unable to discover for years that the doctor's choice of treatment was negligent. The court of appeals held that the plaintiff's

A defendant's identity is never more critical than when the plaintiff is asserting a Fourteenth Amendment under 42 U.S.C. 1983. A claim under Section 1983 only arises when the defendant is acting "under color of any statute, ordinance, regulation, custom or usage of any State." Similarly, in claims based on the Fourteenth Amendment, a defendant's action does not deprive a plaintiff of constitutional rights unless defendant is a state actor. See, *e.g.*, *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 49-50 (1999) ("Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1002 (1982)) (internal quotation marks omitted). Accordingly, it makes no sense to say that a plaintiff must bring a Section 1983 suit before she knows that the state was responsible for the injury. Cf. *Barrett* v. *United States*, 689 F.2d 324, 330 (CA2 1982) ("It is illogical to require a party to sue the government for negligence at a time when the Government's responsibility in the matter is suppressed in a manner designed

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claim did not accrue until he had knowledge "that the treatment was *improper*." *Kubrick*, 444 U.S. at 116 (emphasis added) (quoting 581 F.2d 1092, 1097 (CA3 1978)). The *Kubrick* Court reversed, holding that accrual does not depend on a plaintiff's knowledge that his legal rights have been violated. See 444 U.S. at 122-24. Although the decision did not specifically identify the appropriate standard for determining when a claim accrues, it strongly suggested that it would have been proper for the court of appeals to hold that an FTCA "malpractice claim would not accrue until the plaintiff knew or could reasonably be expected to know of the Government's breach of duty." *Id.* at 125. Three justices would have applied a broader accrual rule that would require evidence of defendant's wrongdoing before a claim could accrue. See *Kubrick*, 444 U.S. at 125-26 (Stevens, J., dissenting) (arguing that the appropriate rule is "that the statute of limitations does not begin to run until after fair notice of the invasion of the plaintiff's legal rights").

to prevent the party, even with reasonable effort, from finding out about it.").

In this case, to be sure, petitioners were aware of their *injuries* at the time of the Riot. As the court of appeals noted, "they had the painful experience of watching neighbors die and seeing their homes and businesses burn." Pet. App. 9a. Indeed, in the wake of the Riot, some victims even filed lawsuits against the city; as Judge Lucero notes in his dissent, however, those suits "fell upon the deaf ears of the courts at the time," Pet. App. 43a, in no small part because of the government's categorical denial of responsibility and placement of blame on the victims, and the grand jury's official exoneration of white rioters.[6] The court of appeals erroneously assumed, however, that petitioners' claims accrued regardless of whether they knew of the government's involvement. *Id.* 10a ("Plaintiffs' injuries and the general cause of those injuries were obvious in the aftermath of the Riot. To start the running of the statute of limitations, our case law requires nothing more."). Until they knew of the government's involvement in the prosecution of the Riot, however, petitioners could not have known of the *constitutional* injuries that they suffered. The city and state's role in the Riot caused the harm that underlies petitioners' claims under Section 1983 and the Fourteenth Amendment, and petitioners' claims thus could

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[6] The mere existence of such suits does not, for several reasons, preclude *all* petitioners from bringing the claims at issue in this case. First, not only were the 1923 allegations regarding the City's culpability made by only a fraction of the victims, but those allegations were neither widely known nor the subject of any significant publicity. Second, petitioners should not be deemed interchangeable and thus should not all be charged with being aware of the allegations of a handful of victims in 1923. Put another way, there are disputed issues of fact regarding whether knowledge of the allegations can fairly be imputed to each petitioner. Third, and in any event, the 1923 suits did not allege culpability on the part of *State* officials.

not have accrued until they should have known not only of their injuries, but of their governmental cause.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 9, 2005[7]

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[7] Counsel for petitioners were principally assisted by the following students in the Harvard Law School Supreme Court Litigation class under the supervision of Thomas Goldstein and Amy Howe: Mark Conrad, Elissa Hart, and Gregory Reilly. Class members Jeffrey M. Harris, Christopher Houpt, Anton Metlitsky, Won Shin, Alixandra Smith, Sharmila Sohoni, and Neel Sukhatme also participated.

# APPENDIX

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 02-16532

JOHN MELVIN ALEXANDER, et al.,
Plaintiffs-Appellants,

v.

THE STATE OF OKLAHOMA; THE CITY OF TULSA; THE CHIEF OF POLICE OF THE CITY OF TULSA, in his official capacity; THE CITY OF TULSA POLICE DEPARTMENT; DOES 1 thru 100, inclusive,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Oklahoma
JAMES O. ELLISON, Senior District Judge, Presiding

Opinion Filed: Sept. 8, 2004

Before TACHA, Chief Circuit Judge, BARRETT, Senior Circuit Judge, and TYMOKOVICH, Circuit Judge.

## OPINION

TACHA, Chief Circuit Judge.

On May 31, 1921, and following into the next day, violent attacks destroyed the African-American community of Greenwood, Oklahoma. An angry white mob converged on Greenwood in a devastating assault, burning homes and businesses, killing up to three hundred people, and leaving thousands homeless. In February 2003, Plaintiffs-Appellants, all Riot survivors or descendants of survivors, filed suit against the City of Tulsa, the Tulsa Police Chief, the City of Tulsa Police Department, and the State of Oklahoma. In their complaint, Plaintiffs sought monetary damages and injunctive and declaratory relief. The District Court held the claims time barred. Because we hold that Plaintiffs' claims cannot withstand scrutiny under either an accrual analysis or pursuant to equitable tolling principles, we AFFIRM.

## I. BACKGROUND

On the evening of May 31, 1921, a crowd began to form in front of the Tulsa jail after rumors of a lynching spread through the city. The rumors followed publication of a newspaper story suggesting that a nineteen-year-old African-American named Dick Rowland had assaulted a white elevator operator. After a group of African-Americans went to the courthouse to defend Mr. Rowland, a struggle ensued; and a gun went off. The Greenwood Riot had begun.

In the midst of repeated gun battles, the African-Americans retreated to the Greenwood neighborhood followed by the white mob, which included between 250-500 newly deputized men. Armed with machine guns, the white mob ravaged Greenwood, scattering machine gun fire indiscriminately at its African-American residents. During the night, the Governor called in the Oklahoma National Guard to restore order. The guardsmen, often acting in conjunction with the white mob, disarmed the African-American men who were defending their community and placed them in "protective custody." Thus purged of any resistance, the white mob burned virtually every building in Greenwood. By 11:00

a.m. on the morning of June 1, 1921, when the Riot ended, forty-two square blocks of the Greenwood community lay in ashes.

In 1997, the Oklahoma state legislature commissioned a study of the Riot. Following four years of intensive study, the bipartisan commission, which consisted of eleven members from various sectors of the community, issued its final report ("the Report"). In it, the commissioners confirmed that public officials had indeed provided firearms and ammunition to the white mob. The Report opined that the National Guard participated in mass arrests of all, or nearly all, of Greenwood's residents. The Report also provided detail concerning the deliberate burning of homes and businesses, burning initiated, in many instances, by agents of the government. In adopting many of the Report's findings, the state legislature found:

> Official reports and accounts of the time that viewed the Tulsa Race Riot as a "Negro uprising" were incorrect. Given the history of racial violence against African-Americans in Oklahoma, including numerous lynchings by white mobs, and the breakdown of the rule of law in Tulsa on May 31-June 1, 1921, it is understandable that African-Americans believed they needed to assist Tulsa police in protecting Dick Rowland, an African-American accused of attempting to rape a white woman, against an assembled white mob. The documentation assembled by The 1921 Tulsa Race Riot Commission provides strong evidence that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence which took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob

> that killed, looted, and burned down the Greenwood area[.] Okla. Stat. tit. 74 § 8000.1.2 (West 2002).

Plaintiffs filed their initial complaint on February 24, 2003. In it, they alleged civil rights claims under 42 U.S.C. §§ 1981, 1983, and 1985. They also brought claims under the Fourteenth Amendment to the Federal Constitution and the Equal Protection Clause. Finally, they submitted state law claims based on negligence and promissory estoppel. Admitting that a two-year statute of limitations applies to the action,[1] Plaintiffs nevertheless argue that the complaint was timely because the "conspiracy of silence" surrounding the Riot and its aftermath delayed the accrual of their claims until issuance of the Report in February 2001. In the alternative, they maintain that various equitable tolling principles apply which extend the limitations period.

Instead of answering the complaint, the State and the City filed motions to dismiss. The District Court allowed the parties to exchange interrogatories and requests for admission pertaining to the statute of limitations issue. In addition, the District Court took testimony from three witnesses, all Plaintiffs' experts, on issues related to the limitations questions. The court also allowed supplemental briefing on whether the publication of a 1982 book by Dr. Scott Ellsworth, entitled Death in a Promised Land, placed Plaintiffs on notice of their claims.

Analyzing the motions to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court held:

> Regardless of the legal theory relied on, equitable estoppel, equitable tolling, or accrual, the gravamen of Plaintiffs' argument is that they did not and could not know of the

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[1] The parties agree that the applicable limitations period for the claims is two years. *See* Okla. Stat. tit 12, § 95 (West 2000); *see also Fratus v. Deland,* 49 F.3d 673, 675 (10th Cir. 1995) (applying state statute of limitation to civil rights actions under § 1983).

> City's involvement any sooner. While it is certain that the Commission Report has helped to gather more facts about the Riot, the Court has considerable trouble with the Plaintiffs' assertion that until the Commission issued its report, they were unaware of the City's responsibility for their injury. Dist. Ct. Order at 18.

The court then granted the Defendants' motions to dismiss. In particular, the court opined that, although extraordinary circumstances sufficient to toll the statute of limitations existed in the period following the Riot, those circumstances dissipated in the 1960s, thus enabling Plaintiffs to bring their claims. *Id.* at 21-23.

On appeal, Plaintiffs argue that the court erred in its application of the motion to dismiss standard by making factual findings, contrary to the dictates of Rule 12(b)(6), regarding when Plaintiffs could access courts to redress the wrongs inflicted by the Riot. They contend that the court committed reversible error in attributing to Plaintiffs knowledge of facts that allegedly came to light only after the Report issued. Finally, they maintain that the court relied improperly on the existence of lawsuits immediately following the Riot to impute knowledge to Plaintiffs. We address these arguments in turn.

## II. Standard of Review

*A. Conversion of the Motions To Dismiss*

In its order, the District Court analyzed Plaintiffs' claims under the dismissal standards of Federal Rule of Civil Procedure 12(b)(6). On appeal, we review a Rule 12(b)(6) dismissal de novo. *Indus. Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 967 (10th Cir. 1994). The City argues, however, that, because the court considered materials outside the complaint in making its rulings, we must apply a summary judgment standard of review. Federal Rule of Civil Procedure 12(c) states:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Fed. R. Civ. P. 12(c).

Specifically, the City maintains that a de facto conversion occurred because (1) both parties presented material to the court which went beyond the four corners of the complaint and (2) the court referenced at least some of those materials in its order. Plaintiffs, on the other hand, argue that although the parties provided additional materials, the court did not rely on them. They maintain that this lack of judicial reliance, and the fact that the parties mentioned outside materials only in passing, prevents us from altering the court's analysis under Rule 12(b)(6).

After carefully reviewing the record and the District Court order, we agree with the City.

> Where a party has moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted and matters outside of the pleadings have been presented to the court for consideration, the court must either exclude the material or treat the motion as one for summary judgment . . . . *Nichols v. United States,* 796 F.2d 361, 364 (10th Cir. 1986).

It is undisputed that the District Court: (1) received materials outside the complaint from both parties, and (2) did not expressly exclude the material. Thus, to convert the District Court's Rule 12(b)(6) order to one for summary judgment, we must find that the District Court relied on this material in rendering its decision. *See United States ex rel. Holmes v. Consumer Ins. Group,* 318 F.3d 1199, 1203 (10th Cir. 2003) (reviewing a district court's Rule 12(b)(6) order as

one for summary judgment where "the district court relied on affidavits and other evidence submitted by the parties").

Contrary to Plaintiffs' suggestion, the record makes clear that the District Court relied substantially on the extraneous evidence in rendering its decision.[2] Specifically, the court referenced in its order the hearing held on the motions to dismiss and the testimony presented by Plaintiffs' experts. Dist. Ct. Order at 4, 22-23. Likewise, the court noted its approval of the supplemental briefs filed on the issue whether the book Death In A Promised Land provided Plaintiffs with notice of their claims, stating that it found these extra materials "helpful." *Id.* at 12. The court also relied specifically on the testimony of one of the experts in making its ruling on the issue of extraordinary circumstances tolling. *Id.* at 22- 23. Nowhere in the order does the court reject or otherwise exclude any of the evidence offered as a result of discovery.[3]

While "the court cannot convert a motion to dismiss to a motion for summary judgment without notice, unless the opposing party has responded . . . by filing his own affidavits[,]" *Ketchum v. Cruz,* 961 F.2d 916, 919 (10th Cir. 1992), we find such a conversion permissible here because

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[2] The District Court also cited extensively from the Report in its order. Because the Report was attached to the complaint, however, it was not "outside the pleadings" for purposes of analyzing this issue. *See GFF Corp. v. Assc. Wholesale Grocers, Inc.,* 130 F.3d 1381, 1384-85 (10th Cir. 1997) (finding consideration of a letter appropriate under a 12(b)(6) standard where it was quoted in the complaint and central to the issues presented).

[3] In this regard, Plaintiffs' reliance on *Owens v. Rush,* 654 F.2d 1370 (10th Cir. 1981), is misplaced. There, we refused to convert a 12(b)(6) ruling into one for summary judgment "because the order [dismissing the claims] refers to no facts shown or admissions made in the papers on file . . . ." *Id.* at 1377 n.9. Here, by contrast, the District Court's order makes clear the court considered evidence and briefing outside the pleadings.

Plaintiffs were both on notice of the possibility of conversion and provided their own affidavit to the District Court, *see Arnold v. Air Midwest, Inc.*, 100 F.3d 857, 859 n.2 (10th Cir. 1996) ("Because [the non-movant] submitted material beyond the pleadings in opposition to defendants' motion, he is scarcely in a position to claim unfair surprise or inequity."). The City filed its motion to dismiss in the alternative as one under Rule 56(c), and Plaintiffs addressed the summary judgment standard in their response to that motion. Plaintiffs also attached an informal affidavit from Dr. Ellsworth to the supplemental brief referenced in the District Court's order. Accordingly, we must review Plaintiffs' accrual claim under a summary judgment standard.

In evaluating a summary judgment order, our review is *de novo*; and we apply the same standard as a district court would. *City of Wichita v. United States Gypsum Co.*, 72 F.3d 1491, 1497 (10th Cir. 1996). Specifically, "summary judgment is appropriate where there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Biester v. Midwest Health Servs., Inc.*, 77 F.3d 1264, 1265 (10th Cir. 1996) (internal quotations and citations omitted); *see also Wolf v. Preferred Risk Life Ins. Co.*, 728 F.2d 1304, 1306-07 (10th Cir. 1984) ("If the statute of limitations depends on disputed [material] facts, then summary judgment is inappropriate.").

*B. Equitable Tolling Claims*

This conclusion does not, however, end our analysis with respect to the standard of review. We must also consider the standard on the equitable tolling claims. The District Court refused to invoke equitable principles to toll the statute of limitations. "We review the district court's refusal to apply equitable tolling for an abuse of discretion." *Garrett v. L.E. Fleming*, 362 F.3d 692, 695 (10th Cir. 2004). Contrary to Plaintiffs' argument, nothing in the District Court's order suggests that it failed to use discretion in considering equitable tolling principles. Thus, we will review Plaintiffs' accrual argument under summary judgment standards and the

District Court's refusal to invoke equitable tolling principles for an abuse of discretion.

## III. DISCUSSION

*A. Accrual Claim*

Plaintiffs filed the underlying complaint on February 24, 2003. Thus, under Oklahoma's applicable two-year statute of limitations provision, the claims are untimely unless they accrued on or after February 24, 2001. Plaintiffs maintain the claims did not accrue until publication of the Report on February 28, 2001. If that is the case, the claims are timely independent of any equitable tolling.

As a preliminary matter, we note that federal law controls issues related to when federal causes of action accrue. *Baker v. Board of Regents of the State of Kansas*, 991 F.2d 628, 632 (10th Cir. 1993). In general, under the federal discovery rule, claims accrue and "the statute of limitations begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action." *Indus. Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 969 (10th Cir. 1994). In particular, "'[a] civil rights action accrues when facts that would support a cause of action are or should be apparent.'" *Fratus v. Deland*, 49 F.3d 673, 675 (10th Cir. 1995) (internal quotations omitted).

It is obvious, and Plaintiffs do not dispute, that they had knowledge of their physical and property-related injuries at the time of the Riot. Indeed, they had the painful experience of watching neighbors die and seeing their homes and businesses burn. Widespread publicity surrounded this devastation. News articles attached to the Report illustrate that the Riot's impact was not only known locally, but that it became a national news event as well.

Despite these obvious signs of injury, Plaintiffs argue that the causes of action lay dormant until issuance of the Report because, until that time, they did not know the level of culpability or responsibility of the City and State. We have found, however, that a plaintiff need not have conclusive

evidence of the cause of an injury in order to trigger the statute of limitations. *See Baker*, 991 F.2d at 632 ("It is not necessary that a claimant know all of the evidence ultimately relied on for the cause of action to accrue."). Rather, we focus on whether the plaintiff knew of facts that would put a reasonable person on notice that wrongful conduct caused the harm. See *id.* In this context, a plaintiff must use reasonable diligence in seeking to discover facts giving rise to a claim for relief. *See Industrial Constr.*, 15 F.3d at 969.

Despite the difficult facts presented here, we resist the temptation to alter circuit precedent in the manner Plaintiffs suggest. Taken to its logical end, their argument would require us to craft a rule delaying accrual of a cause of action until a plaintiff has detailed knowledge of the level of culpability of each of the actors involved. This we cannot do.[4] Plaintiffs' injuries and the general cause of those injuries were obvious in the aftermath of the Riot. To start the running of the statute of limitations, our case law requires nothing more. We hold, therefore, that the Defendants were entitled to summary judgment on the issue whether Plaintiffs' claims accrued prior to publication of the Report.

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[4] Plaintiffs rely heavily on *Maughan v. SW Servicing, Inc.*, 758 F.2d 1381 (10th Cir. 1985), to support their argument that a plaintiff must know the level of a defendant's culpability before a cause of action accrues. In *Maughan*, under Utah's version of the discovery rule, we approved a rule allowing tolling in a wrongful death suit involving exposure to carcinogens "until the plaintiff knows or should know of facts supporting the likelihood that one particular suspected carcinogen was the cause of his cancer, and has identified the likely source of his exposure to that carcinogen." *Id.* at 1387. We adopted this liberal application of the discovery rule only "in cases involving suspected carcinogens" because of their invisible nature, their impossibility to ascertain at the time of exposure, and "the complexities of cancer causation." *Id.* In contrast, Plaintiffs faced violence here which was notable in part for its very public and obvious nature.

*B. Equitable Tolling*

Plaintiffs advocate tolling of the limitations period under several legal theories. First, they maintain that Defendants concealed the nature of their bad acts by manipulating the post-Riot grand jury, which exonerated the white mob and blamed victims for the Riot. That concealment, they argue, prevented Plaintiffs from gathering the facts necessary to pursue their claims. Second, Plaintiffs assert they relied to their detriment on the City's promises to rebuild Greenwood, which made them sit on their rights in hopes that the City and State would compensate them. Third, Plaintiffs claim extraordinary circumstances, including a racially hostile environment and an inability to seek meaningful redress in Oklahoma courts, existed sufficient to toll the statute.

The District Court rejected the first two equitable theories, but held that sufficient extraordinary circumstances existed to justify tolling. The court also found, however, that those circumstances dissipated substantially by the 1960s. As a result, it determined that Plaintiffs could have brought this action at some unspecified point prior to 2001. We must affirm the District Court on this issue unless we have "'a definite and firm conviction that [it] has made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998) (quoting *McEwen v. City of Norman*, 926 F.2d 1539, 1553-54 (10th Cir. 1991)).

"Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983 - a void which is commonplace in federal statutory law." *Board of Regents v. Tomanio*, 446 U.S. 478, 484, (1980). As such, state law governs the application of tolling in a civil rights action.[5] *See id.* at 484-87; *Garrett*, 362 F.3d at 697.

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[5] We note that "federal courts possess the power to use equitable principles to fashion their own tolling provisions in exceptional situations in which state statutes of limitations eradicate

In general, Oklahoma permits the tolling of a statute of limitations in two circumstances. First, the existence of a "legal disability" provides proper grounds for equitable tolling. See Okla. Stat. tit. 12, § 96 (West 2000). Although the exact definition of this term remains unclear, Oklahoma courts have applied this provision only for plaintiffs whose competency is impaired or who have not reached the age of majority. *See, e.g., Lovelace v. Keohane*, 831 P.2d 624, 629 (Okla. 1992) (finding that those who could conduct their own business affairs over time are sufficiently competent to render them ineligible for "legal disability" tolling); Okla. Stat. tit. 12, § 96 (citing incompetence and failure to attain the age of majority as grounds for meriting legal disability tolling). As Plaintiffs offer no evidence of such incompetency, they fail to meet this standard.

Second, the Oklahoma discovery rule tolls the statute of limitations "until an injured party knows of, or in the exercise of reasonable diligence, should have known of or discovered the injury, and resulting cause of action." Id. Therefore, if defendants engage in "false, fraudulent or misleading conduct" calculated to lull plaintiffs into sitting on their rights, the limitations period may not be triggered. *Jarvis v. City of Stillwater*, 732 P.2d 470, 473 (Okla. 1987); *see also*

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rights or frustrate policies created by federal law." *Rodriguez v. Holmes*, 963 F.2d 799, 805 (5th Cir. 1992); *see also Tomanio*, 446 U.S. at 485 (holding that federal courts should not apply state statute of limitations and tolling rules that are "inconsistent with the federal policy underlying the cause of action under consideration") (quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975)). The Court in *Tomanio* found that the failure of New York to toll an "action during the period in which a litigant pursues a related, but independent cause of action" did not frustrate the federal policy goals - compensation, deterrence, uniformity and federalism - under § 1983. *Tomanio*, 446 U.S. at 486. Likewise, recognizing the broad equitable tolling available to a plaintiff under Oklahoma law, we do not find the Oklahoma statute of limitations contrary to the policy underlying § 1983.

*Hurt v. Garrison*, 133 P.2d 547, 550 (Okla. 1942) (holding a statute of limitations tolled during a period of fraudulent concealment). With these standards in mind, we turn to Plaintiffs' claims.

*1. Concealment*

As the District Court noted, a defendant who conceals facts relevant to a cause of action against him is estopped from raising the statute of limitations bar. *Morris v. Wise*, 293 P.2d 547, 549 (Okla. 1956). Here, Plaintiffs argue that Defendants cannot rely on the bar because they concealed facts relevant to Plaintiffs' causes of action. Plaintiffs assert three primary acts of concealment or fraud. First, they maintain the City was complicit in the erroneous grand jury report that blamed the victims, rather than the white mob, for the destruction in Greenwood. Second, they contend the City failed to investigate or take action against the lawless behavior of the mob and that the failure was, in essence, an act of concealment. Third, Plaintiffs claim that the disappearance of documents and files from the Oklahoma National Guard, the County Sheriff, and the Tulsa Police Department constitutes active concealment of information. They allege that these combined acts represent the "conspiracy of silence" referenced in the Report. *See* Okla. Stat. tit. 74, § 8000.1.4 (West 2002).

On its face, Plaintiffs' argument is compelling. As stated previously, however, the record suggests, and it is undisputed, that substantial information regarding government involvement in the disturbance was available at the time of the Riot. Specifically, Plaintiffs do not dispute that Riot victims filed over one hundred lawsuits seeking redress for property and other losses. One lawsuit reached the Oklahoma Supreme Court in 1923. In its decision, the court described the Riot scene as follows.

> A large number of white men . . . broke into a hardware store, a pawnshop, and another place where arms were kept, and armed themselves with guns, revolvers, and ammunition, and in a

> short while after the firing occurred at the courthouse the streets were full of armed white people. Two or three hundred armed men assembled around the police station and were sent out to different parts of the town ostensibly to guard the town. From that time until about 9 or 10 o'clock the following day there was a great deal of shooting, especially in the negro section of the city, and a number of men were killed. . . . About daylight on the morn [sp] of June 1st, at the sound of a whistle, shooting became rather general and continued for some time. Armed white men, described as traveling in groups of from a dozen to twenty, rounded up the negroes found in the section where the fires were burning and took, or sent, them to the convention hall, where they appear to have been detained. A number of witnesses testified that these groups of white men, many of them wearing police badges and badges indicating they were deputy sheriffs, after removing the negroes from the buildings, went inside the buildings, and, after they left, fires broke out inside the buildings. By 9 o'clock, buildings were burning in every part of the negro section of the city. *Redfearn v. American Century Ins. Co.*, 243 P. 929, 929-30 (Okla. 1926).

Likewise, in the immediate aftermath of the Riot, Plaintiff Barney Cleaver sued the ex-mayor of Tulsa, as well as its police chief. In his complaint, he opined that his detention during the Riot "was affected by agents, servants, and employees of the defendant city and by the direction of the officials above named and mentioned." Plaintiff Ruth Calhoun, suing for damage to her property in 1923, averred that her losses were the "proximate and immediate result and consequence of the conspiracy, illegal acts of omission and commission of the defendant City . . . ."

Plaintiffs do not dispute the veracity of these documents. Rather, they maintain the complaints were futile and confirm that not a single African- American recovered any damages for their losses. While that is true, and certainly tragic, it is not relevant to the narrow issue presented here: whether the District Court abused its discretion in finding, based on undisputed evidence, that Defendants' alleged concealment did not bar Plaintiffs from uncovering essential information about their claims. Finding that ample information existed about their claims in the aftermath of the Riot,[6] we hold, based on our review of the record, that the court did not abuse its discretion when it rejected tolling based on Defendant's concealment.

*2. Detrimental Reliance*

In the District Court, Plaintiffs maintained they relied to their detriment on Defendants' promises of rebuilding and, as a result, are entitled to tolling of the statute of limitations. *See Jarvis,* 732 P.2d at 472 (noting that tolling is appropriate where defendants provide "assurances . . . reasonably calculated to lull the plaintiff into a sense of security"); *see also Fischer v. Atlantic Richfield Co.,* 774 F. Supp. 616, 619 (W.D. Okla. 1989) (holding defendant estopped to plead limitations defense where it made "unfulfilled promises to plaintiffs"). The second amended complaint, as well as the arguments in Plaintiffs' briefs, make clear, however, that the racial hostility of the day made it wholly unreasonable for Plaintiffs to rely on any promises of restitution. Indeed, the City of Tulsa imposed zoning restrictions shortly after the Riot which crippled the victims' ability to rebuild. After courts declared those restrictions unconstitutional, the City

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[6] We note that the standard for determining whether a federal claim has accrued is objective. *See Anixter v. Home-Stake Prod. Co.,* 947 F.2d 897, 899 n.5 (10th Cir. 1991), *vacated sub nom. on other grounds, Dennler v. Trippet,* 503 U.S. 978 (1992). Thus, if facts giving rise to a claim were available generally, but simply unknown to these particular plaintiffs, tolling does not apply.

refused to provide any compensation. Thus, the District Court did not err in rejecting tolling on this basis.

*3. Extraordinary Circumstances*

In the appropriate case, exceptional circumstances may justify tolling a statute of limitations. *United States v. Clymore*, 245 F.3d 1195, 1199 (10th Cir. 2001); *see also Van Tu v. Koster*, 364 F.3d 1196, 1199-1200 (10th Cir. 2004) (considering application of equitable tolling where victims of the My Lai massacre raised claims twenty-eight years after their injuries occurred). Here, Plaintiffs argue that a combination of exceptional circumstances justify tolling, including: an openly hostile racial environment, denial of responsibility by government officials, the grand jury's exoneration of white rioters, and its indictment of African-American victims.

A review of the materials attached to the Report makes clear that at the time of the Riot the victims were powerless against the white majority. Meaningful access to the courts was denied, as was any ability to obtain damages for property losses. Also, a widespread fear of reprisals pervaded the African- American community. We agree with the District Court that, in the immediate aftermath of the Riot and for several decades thereafter, extraordinary circumstances justified tolling the statute of limitations.

Fundamentally, however, the issue is whether, based on the allegations in the complaint and the record, those circumstances existed through the issuance of the Report in 2001. In making this determination, we need not pinpoint an exact date when the exceptional circumstances ended. Rather, the judgment must stand if, based on the undisputed facts available, those circumstances ended sometime prior to February 2001. *Cf. Van Tu*, 364 F.3d at 1199-1200.

As stated above, evidence suggesting the City and State's involvement in the Riot was available in its immediate aftermath and, at the very least, upon publication of Death In A Promised Land in 1982. While exceptional circumstances may have prevented victims from seeking timely legal redress

based on that evidence, the emergence of civil rights legislation in the 1960s gave them the ability to do so. In fact, Plaintiffs neither allege nor even imply that they were prohibited from accessing the courts in the 1970s, 1980s, or 1990s. Thus, finding the two required elements of information and access satisfied, the District Court did not abuse its discretion in holding that the exceptional circumstances which tolled the statute of limitations immediately after the Riot had dissipated sufficiently to trigger running of the statute at some point prior to 2001.[7]

## IV. CONCLUSION

The Tulsa Race Riot represents a tragic chapter in our collective history. While we have found no legal avenue exists through which Plaintiffs can bring their claims, we take no great comfort in that conclusion. As the Supreme Court has recognized, "it goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable." *United States v. Kubrick*, 444 U.S. 111, 125 (1979). The judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

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[7] In the District Court, Plaintiffs also urged tolling based on vindication of the public interest and the State's promise of reparations after the Report issued. Because they failed to raise those issues in their appellate briefs, we deem them waived. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n.7 (10th Cir. 1994). In addition, in light of our disposition on the statute of limitations issue, we need not address the remainder of Plaintiffs' arguments on appeal.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Case No. 03-C-133-E

JOHN MELVIN ALEXANDER, et al.,
Plaintiffs-Appellants,

v.

THE STATE OF OKLAHOMA; THE CITY OF TULSA; THE CHIEF OF POLICE OF THE CITY OF TULSA, in his official capacity; THE CITY OF TULSA POLICE DEPARTMENT; DOES 1 thru 100, inclusive,
Defendants-Appellees.

Filed: March 19, 2004

JAMES O. ELLISON, Senior District Court Judge

**ORDER**

Now before the Court is the Motion To Dismiss Second Amended Complaint on Behalf of Defendant "State of Oklahoma" (dkt # 59), the Defendant "State of Oklahoma's" Supplemental Motion to Dismiss Second Amended Complaint (dkt # 82), and the Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment (dkt # 92).

Plaintiffs' claims arise out of the Tulsa Race Riot of 1921, a tragic moment in Oklahoma's history, and the worst civil disturbance since the Civil War. The Riot, costly in terms of lives and property, destroyed the African-American Community of Greenwood and affects relations among races in the City of Tulsa and the State of Oklahoma to this date.

Plaintiffs, survivors of the Riot of May 31, 1921 to June 1, 1921, and descendants of persons affected by the Riot, bring claims against the State of Oklahoma, the City of Tulsa, the Chief of Police, the Tulsa Police Department, and John Does 1 through 100 for damages they sustained in the Riot. Plaintiffs bring claims against the City of Tulsa, the Chief of Police, and the Tulsa Police Department for deprivation of life and liberty in violation of the Fourteenth Amendment of the United States Constitution (first cause of action), for deprivation of property in violation of the Fourteenth Amendment (second cause of action), and for deprivation of their right to equal protection under the law in violation of the Fourteenth Amendment (third cause of action). With respect to the deprivation of life and liberty claim, certain Plaintiffs allege they had relatives killed in the Riot, or that the Plaintiffs themselves were physically or emotionally injured during the Riot. With respect to the deprivation of property claim, certain Plaintiffs allege they had real and personal property burned, looted or otherwise destroyed in the Riot. With respect to the equal protection claim, all Plaintiffs claim they were denied their equal rights under the law because Defendants "routinely under-investigated, under-responded, undercharged, mishandled and failed to protect Plaintiffs from a series of criminal acts or prosecute those responsible for such acts."

Plaintiffs also bring a claim against all Defendants for violation of 42 U.S.C. § 1981 (fourth cause of action). Here Plaintiffs claim they were intentionally discriminated against in an effort to deny African-Americans their equal rights under the law. Plaintiffs bring claims against the City of Tulsa, the Chief of Police, the Tulsa Police Department, and Does 1 through 100 for violation of 42 U.S.C. § 1983 (fifth cause of action) and violation of 42 U.S.C. § 1985 (sixth cause of action). In their § 1983 claim, Plaintiffs allege they were deprived of their federal rights pursuant to Defendants' longstanding official policy, practice or custom of racial discrimination and their reckless or callous indifference to

Plaintiffs' federally protected rights. In their § 1985 claim, Plaintiffs allege a conspiracy to deprive them of equal protection under the law.

Plaintiffs also bring two common law claims: one for promissory estoppel (seventh cause of action) against the State of Oklahoma and the City of Tulsa, and one for negligence (eighth cause of action) against the State of Oklahoma, City of Tulsa, Chief of Police, and the Tulsa Police Department. In their promissory estoppel claim, Plaintiffs allege that the State of Oklahoma is estopped from asserting the statute of limitations because of its promises in 1999 that restitution or reparations would be made for damages incurred during the Riot, and that the City of Tulsa is estopped from asserting the statute of limitations because of promises made in 1921 and 1999 regarding restitution for damages. With respect to negligence, Plaintiffs allege that Defendants were negligent in deputizing and issuing ammunition during the Riot, in failing to adequately train and supervise its deputies, and in failing to train and supervise the National Guardsmen and members of police who were called to duty during the Riot.

Defendants did not answer, but have filed motions to dismiss. The State argues that Plaintiffs' claims should be dismissed because they are barred by the statute of limitations, because claims for monetary damages are barred by the immunity of the eleventh amendment, and because the claim for negligence is barred by the doctrine of sovereign immunity. The City argues that Plaintiffs' claims are conclusively time barred, and that the "descendant" Plaintiffs do not have standing to sue.

On February 13, 2004, The Court heard arguments on the motions to dismiss. The Court allowed Plaintiffs to present three witnesses in support of their position: Dr. John Hope Franklin, Dr. Eric Caine, and Dr. Eric Litwack. The parties were given the opportunity to address the recent case of. *In re African-American Slave Descendants Litigation,* 304 F. Supp. 2d 1027 (N.D. Ill). The Court also raised the question of

whether this case should not be considered on the merits because it involves a political question. All parties were given an opportunity to submit additional briefing on this issue. Therefore, this Order will consider not only the motions to dismiss, but also the issue of whether this case involves a political question.

**A. LEGAL STANDARD**

In considering a motion to dismiss, the Court accepts the well-pled allegations in the complaint as true and construes them most favorably to the plaintiff. *Gonzales v. City of Castle Rock,* 307 F.3d 1258, 1261 (10th Cir. 2002). A complaint may be dismissed pursuant to Fed.R.Civ.P. 12(b)(6) only "if the plaintiff can prove no set of facts to support a claim for relief." *Id.*

With respect to statute of limitation, if the dates given in the complaint make clear that the right sued upon has been extinguished, plaintiff has the burden of establishing a factual basis for tolling the statute. *Aldrich v. McCulloch Prop., Inc.,* 627 F.2d 1036, 1041, n. 4 (10th Cir. 1980). Statute of limitations questions, therefore may be appropriate to consider on a motion to dismiss. *Id.*

**B. BACKGROUND FACTS**

Plaintiffs' allegations center around a riot that began on the evening of May 31, 1921, and lasted into the day of June 1, 1921, destroying the African-American community of Greenwood, located just to the north of downtown Tulsa. The bulk of Plaintiffs' allegations, and the factual background for their Complaint, appear to be taken from Tulsa Race Riot, A Report by the Oklahoma Commission to Study the Tulsa Race Riot of 1921, published on February 28, 2001 ("Commission Report"), and the scholarly papers attached to that Report.

On May 31, 1921, Dick Rowland, an African-American, was arrested for allegedly assaulting Sarah Page, a white elevator operator, in the elevator in the Drexel Building on

the previous day.[1] A white mob gathered outside the courthouse, and, amid rumors of a lynching, a group of African-American men went to the courthouse to prevent the lynching. When assured that Dick Rowland was safe, the men returned to Greenwood.[2] Members of the white mob began to arm themselves.[3] As rumors circulated, a group of armed African American men returned to the courthouse to protect Dick Rowland. When a white man attempted to take a gun from an African American veteran, a shot rang out.[4] The race riot had begun.

The key facts underlying Plaintiffs' claims are best summarized in the Commission Report:

> Black Tulsans had every reason to believe that Dick Rowland would be lynched after his arrest on charges later dismissed and highly suspect from the start.
>
> They had cause to believe that his personal safety, like the defense of themselves and their community depended on them alone.
>
> As hostile groups gathered and their confrontation worsened, municipal and county authorities failed to take actions to calm or contain the situation
>
> At the eruption of violence, civil officials selected many men, all of them white and some of them participants in that violence, and made those men their agents as deputies.

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[1] Scott Ellsworth, The Tulsa Race Riot, published with the Commission Report, 37, 57 (2001).

[2] *Id.* at 61.

[3] *Id.*

[4] *Id.* at 63.

In that capacity, deputies did not stem the violence but added to it, often through overt acts themselves illegal.

Public officials provided firearms and ammunition to individuals, again all of them white.

Units of the Oklahoma National Guard participated in the mass arrests of all or nearly all of Greenwood's residents, removed them to other parts of the city, and detained them in holding centers.

Entering the Greenwood district, people stole, damaged or destroyed personal property left behind in homes and businesses.

People, some of them agents of the government, also deliberately burned or otherwise destroyed homes credibly estimated to have numbered 1,256, along with virtually every other structure -- including churches, schools, businesses, even a hospital and library -- in the Greenwood district.

Despite duties to preserve order and to protect property, no government at any level offered adequate resistance, if any at all, to what amounted to the destruction of the neighborhood referred to commonly as "Little Africa" and politely as the "Negro quarter."

Although the exact total can never be determined, credible evidence makes it probable that many people, likely numbering

> between one and three hundred, were killed during the riot.
>
> Not one of these criminal acts was then or ever has been prosecuted or punished by government at any level, municipal, county, state, or federal.
>
> Even after the restoration of order, it was official policy to release a black detainee only upon the application of a white person, and then only if that white person agreed to accept responsibility for that detainee's subsequent behavior.
>
> As private citizens, many whites in Tulsa and neighboring communities did extend invaluable assistance to the riot's victims, and the relief efforts of the American Red Cross in particular provided a model of human behavior at its best.
>
> Although city and county government bore much of the cost for Red Cross relief, neither contributed substantially to Greenwood's rebuilding; in fact, municipal authorities acted initially to impede rebuilding.
>
> In the end, the restoration of Greenwood after its systematic destruction was left to the victims of that destruction.
> Commission Report, 11-14.

Once the Tulsa Race Riot Commission completed its Report, the legislature of the State of Oklahoma adopted many of its findings. The findings of the Oklahoma Legislature shed light on the causes of the Riot and the damage created by the Riot. The Legislature found:

1. The root causes of the Tulsa Race Riot reside deep in the history of race relations in Oklahoma and Tulsa which included the enactment of Jim Crow laws, acts of racial violence (not the least of which was the 23 lynchings of African-Americans versus only one white from 1911) against African-Americans in Oklahoma, and other actions that had the effect of "putting African Americans in Oklahoma in their place" and to prove to African-Americans that the forces supportive of segregation possessed the power to "push down, push out, and push under" African-Americans in Oklahoma;
2. Official reports and accounts of the time that viewed the Tulsa Race Riot as a "Negro uprising" were incorrect. Given the history of racial violence against African-Americans in Oklahoma, including numerous lynchings by white mobs, and the breakdown of the rule of law in Tulsa on May 31 - June 1, 1921, it is understandable that African-Americans believe they needed to assist Tulsa police in protecting Dick Rowland, an African-American accused of attempting to rape a white woman, against an assembled white mob. The documentation assembled by The 1921 Tulsa Race Riot Commission provides strong evidence that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases, became participants in the subsequent violence that took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area;

3. The staggering cost of the Tulsa Race Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African-Americans, the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters. The Tulsa Race Riot Commission estimates that the property costs in the Greenwood district was approximately $2 million in 1921 dollars or $16,752,600 in 1999 dollars. Nevertheless, there were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot. Moreover, local officials attempted to block the rebuilding of the Greenwood community by amending the Tulsa building code to require the use of fire-proof material in rebuilding the area thereby making the costs prohibitively expensive;

4. Perhaps the most repugnant fact regarding the history of the 1921 Tulsa Race Riot is that it was virtually forgotten, with the notable exception of those who witnessed it on both sides, for seventy-five (75) years. This "conspiracy of silence" served the dominant interests of the state during that period which found the riot a "public relations nightmare" that was "best to be forgotten, something to be swept well beneath history's carpet" for a community which attempted to attract new businesses and settlers;

5. The work of many individual Oklahomans and now of The 1921 Race Riot Commission

> has forever ended the "conspiracy of silence" surrounding the events in Tulsa of May 31-June 1, 1921, and their aftermath. The Commission has subsequently turned the responsibility for how the State of Oklahoma will respond to the historical record to the 48th Oklahoma Legislature; and
>
> 6. The 48th Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 concurs with the conclusion of The 1921 Tulsa Race Riot Commission that the reason for responding in the manner provided by this act is not primarily based on the present strictly legal culpability of the State of Oklahoma or its citizens. Instead, this response recognizes that there were moral responsibilities at the time of the riot which were ignored and have been ignored ever since rather than confront the realities of an Oklahoma history of race relations that allowed one race to "put down" another race. Therefore, it is the intention of the Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 to freely acknowledge its moral responsibility on behalf of the State of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.

Okla. Stat. tit. 74, § 8000.1. In the absence of the desired response by the 48th Oklahoma Legislature, Plaintiffs brought this suit.

**C. PRELIMINARY ISSUES**

Four preliminary motions must be considered before the motions to dismiss. First, the City filed a Motion to Exclude the Report and Testimony of Dr. Eric D. Caine (dkt # 93), arguing that Dr. Caine's testimony is not relevant to the issues

before the court does not meet the reliability requirements of *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579 (1993). The City argues that Dr. Caine's testimony is not sufficiently tied to the facts of the case to aid the fact finder in resolving any factual dispute, as is required by *Daubert.* At the hearing on the motions to dismiss, the Court allowed Dr. Caine to testify, reserving the question of whether his testimony would meet the requirements of *Daubert.* Dr. Caine, a psychiatrist, testified that survivors of the Riot were "walking on eggshells afterwards, because they were afraid the same rampage, the same killing and arson and brute force coercion that occurred before could occur again. "He also testified that "few would have had the psychological resources to vigorously pursue restitution in court." Dr. Caine also admitted that he spoke to only six plaintiffs in this case.

While the Court is concerned about whether Dr. Caine's testimony meets the requirements of *Daubert,* the issue is moot because his testimony is not relevant to any factual issue in the case. As will be discussed in greater detail later, there is plenty of evidence, other than the testimony of Dr. Caine, to support the premise that African-Americans would have, and did have, an extremely difficult time pursuing their legal rights in the aftermath of the Riot. The difficult question centers around the legal significance of that difficulty. Dr. Caine does not and cannot address that issue.

In addition Defendants have sought leave to file replies in support of their motions to dismiss. The Court finds that the replies would be helpful and the motions should be granted.

An additional preliminary issue is raised with the City's Motion to Strike Plaintiffs' Supplemental Memo of Law in Opposition to Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment (dkt # 123). Here, the City objects to Plaintiffs' Supplemental Memo of Law filed after the hearing on the motions, arguing that Plaintiffs address an issue in addition to the issue directed by the Court. In the course of this case, the Court has liberally allowed supplemental briefs in order to be fully informed on the

complex and important issues before it. The additional briefing by Plaintiffs on the issue of whether the publication of Dr. Scott Ellsworth's book, Death in a Promised Land, in 1982 marked the point at which Plaintiffs' were on notice of their claims is also helpful to the Court. There is no reason to strike the supplemental brief.

**D. JUSTICIABILITY**

**1. Political Question**

The State, but not the City, contends this case should not be considered on its merits because it involves a political question. The political question doctrine provides that a federal court, which otherwise has jurisdiction over a dispute, should decline to adjudicate the dispute on the grounds that the case raises questions which should be addressed by the representative branch of our government. *Baker v. Carr,* 369 U.S. 186 (1962). In *Baker,* the United States Supreme Court set forth six factors for determining whether a case involved a political question requiring it to be dismissed as non-justiciable:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially-discoverable and manageable standards for resolving it; or the impossibility of deciding it without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect for coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. *Baker,* 369 U.S. at 217.

Relying on *In re African-American Slave Descendants Litigation,* ---F. Supp.---, 2004 WL 112646 (N.D. Ill.), the state argues that this case should be dismissed because there is a textually demonstrable commitment of the issue of reparations to Tulsa race riot survivors to the Oklahoma Legislature. Plaintiffs argues that none of the six factors apply in this case, that the political question doctrine does not apply to federal – state relations, and that the analysis in *In re African-American Slave Descendants Litigation* also does not apply here.

The Court agrees that the political question doctrine does not apply to federal-state relations, which are at issue here. "It is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Elrod v. Burns,* 427 U.S. 347, 351 (1976). "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230. The State does not point to any authority where the political question doctrine was applied to an issue arguably reserved to the state legislature.

The state also argues that the reasoning of the Court in *In re African-American Slave Descendants Litigation* is applicable here. The analysis in that case was that since Congress has addressed the injuries of slavery in a comprehensive manner, the Court should not address these issues. It is important to note that no federal law addresses the Tulsa Race Riot or provides any compensation to its victims. Moreover, the Oklahoma legislature has not rejected the notion that judicially ordered relief for legal wrongs could or would be appropriate. The Court concludes that the political question doctrine does not apply in this case.

**2. Standing**

The City argues that the descendant Plaintiffs do not have standing to sue. Relying principally on *In re African-American Slave Descendants Litigation,* the City argues that a genealogical relationship between a descendant and someone who actually suffered harm is insufficient to confer standing

To have standing, (1) plaintiffs must have suffered an injury in fact, (2) there must be a causal connection between the injury and conduct complained of, and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). At the motion to dismiss state, general factual allegations of injury resulting from defendant's conduct suffice. *Id.* at 561.

The Court finds that Plaintiffs, including descendant Plaintiffs, have made the general factual allegations of injury resulting from defendant's conduct sufficient to meet the requirements of *Lujan v. Defenders of Wildlife.* Moreover, *In re African-American Slave Descendants Litigation* is factually distinguishable. The descendant Plaintiffs in this case do not claim derivative injury resulting from a wrong done to a population in general. Rather they are alleging specific injury as a result of being the descendant of a specific victim of the Race Riot, and they are claiming a direct link to the damages caused by the Riot. The Court finds that these allegations are sufficient to withstand a motion to dismiss on grounds of standing.

**E. STATUTE OF LIMITATIONS**

Defendants argue that Plaintiffs' claims are barred by the applicable statute of limitations. Defendants assert that, pursuant to Okla. Stat. tit. 12, § 95, the statute of limitations for a civil rights action in Oklahoma is two years, and that since Plaintiffs' injuries occurred on May 31 and June 1, 1921, their claims are time-barred. Plaintiffs do not disagree with the statute of limitations that Defendants seek to apply, but argue that equitable tolling, equitable estoppel, or promissory estoppel either toll the statute of limitations or

operate to prevent the statute of limitations from barring their claims. In addition, Defendants argue that the statute of limitations does not run on lawsuits seeking to vindicate public interest.

It is undisputed that a two year statute of limitation applies to civil rights claims in Oklahoma. It is also clear that while state law governs limitations and tolling issues, federal law governs the accrual of claims. *Fratus v. DeLand,* 49 F.3d 673, 675 (10th Cir. 1995). Statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry Express Agency, Inc.,* 321 U.S. 342, 348-49 (1944). However, "exceptions" to statutes of limitations exist in equitable doctrines such as equitable estoppel, equitable tolling and waiver.

Plaintiffs argue that Defendants are equitably estopped from invoking the statute of limitations because the City concealed its participation in the riot and because the City made binding promises to provide restitution to the victims of the riot. These issues of law focus on the wrongful conduct of Defendants.

Plaintiffs also argue that equitable tolling prevents the operation of the statute of limitations in this case. Equitable tolling focuses on the conduct and diligence of Plaintiffs. Plaintiffs argue that the statute of limitations should be equitably tolled in this case because extraordinary circumstances following the Riot prevented them from asserting their rights, and, until the Commission Report, they were unable to obtain information necessary to bring their claim.

**1. City's Concealment and Plaintiffs' Knowledge**

A defendant is "estopped from interposing the defense of a time bar" if he has made "any false, fraudulent or misleading conduct or some affirmative act of concealment to exclude suspicion and preclude inquiry." *Jarvis v. City of*

*Stillwater,* 732 P.2d 470 (Okla. 1987). A party that conceals "the fact that a cause of action has accrued against him" is estopped from raising the statute of limitations defense. *Morris v. Wise,* 293 P. 2d 547, 549 (Okla. 1956). Plaintiffs argue that the City concealed its role in the Riot through the convening of a Grand Jury that blamed the Riot on the victims, the failure to investigate the riot or prosecute persons who committed murder or arson, and the disappearance of official files from the Oklahoma National Guard, the County Sheriff, and the Tulsa Police Department. Plaintiffs further support this argument with the language from Okla.Stat.tit. 74, § 8000.1.4. referring to a "conspiracy of silence" that "served the dominant interests of the state."

In addition to arguing that the City concealed its role in the Riot, invoking the doctrine of equitable estoppel, Plaintiffs argue that their claims did not accrue until they knew of the City's involvement. A civil rights action does not accrue under federal law until the facts that support a cause of action are or should be apparent. *Fratus,* 49 F.3d at 675.

Equitable tolling also applies, even if there is no concealment, if "despite all due diligence [plaintiff] is unable to obtain vital information bearing on the existence of his claim." *Richards v. Mileski,* 662 F.2d 65 (D.C. Cir. 1981). The concept of equitable tolling was applied to allow descendants of Jewish customers of French financial institutions to sue those institutions for alleged participation in a scheme to appropriate assets of customers during Nazi occupation in *Bodner v. Banque Paribas,* 114 F. Supp.2d 117 (E.D. N.Y. 2000). Suit was brought in 1997 for spoilation of assets occurring in the 1940's. The Court found that tolling was appropriate where "plaintiffs can show that it would have been impossible for a reasonably prudent person to learn or discover critical facts underlying their claim." *Id.* at 135. In the present case, Plaintiffs argue that they could not have known of the City's involvement until the Commission had completed its report.

Regardless of the legal theory relied on, equitable estoppel, equitable tolling, or accrual, the gravamen of Plaintiffs' argument is that they did not and could not know of the City's involvement any sooner. While it is certain that the Commission Report has helped to gather more facts about the Riot, the Court has considerable trouble with the Plaintiffs' assertion that until the Commission issued its report, they were unaware of the City's responsibility for their injury.

The allegations in the Complaint do not support this assertion. In their Complaint, Plaintiffs assert that the City refused to pay any restitution to African-American survivors of the riot. Second Amended Complaint (SAC), 22. They further assert that "Legal redress was also stymied by Oklahoma common law doctrine, which unconstitutionally limited municipal liability. Precedent applied from Oklahoma's Territorial Court made it difficult, if not impossible, for Riot victims to sustain a claim against the City of Tulsa or its actors absent ratification by the City Council." SAC, 23. These allegations demonstrate that some Riot victims did attempt to hold the City responsible, realizing the City's role before the publication of the Commission Report.

Other allegations in the Complaint demonstrate the obvious, that victims of the Riot would have observed the City's actions during the Riot. Plaintiffs allege:

> The white Police Chief John A Gustafson, deputized between 250 and 500 white men The police issued guns to the newly deputized white citizens of Tulsa to put down what they referred to as a "Negro uprising," but failed to even record the names of the people to whom they gave the guns. After the Riot, Police Chief Gustafson pleaded in the pages of a white Tulsa newspaper for the return of guns, stating they were issued with the understanding that they would be returned when the need for them passed. SAC, 168-69.

There is also an allegation in the Complaint that "Binkley Wright saw many African Americans killed when the white mob, including newly deputized members of the police department and men in military uniform broke through and heavily attacked the church." SAC, 170. The Complaint is replete with allegations of misconduct by "deputies" and Guardsmen who would have had to have been observed by African American victims of the Riot.

In addition, comments in some of the papers attached to the Commission Report demonstrate the victims' awareness of the City's role in the Riot. It is clear that more than one hundred lawsuits were filed against the City, insurance companies, and even Sinclair Oil Company.[5] In one paper, it is noted that "After the riot, a number of black Tulsans, strongly condemned, in no uncertain terms, the actions of both the Tulsa Police Department and the local National Guard units during the conflict."[6] The Court concludes, therefore, that the allegations in the Complaint do not support Plaintiffs' assertion that they did not or could not have known of the City's role in the Riot immediately after the riot.

**2. The City's Promises of Restitution**

The Plaintiffs argue that Defendants are "estopped from interposing the defense of a time bar" where they have made "(a) some assurances of settlement negotiations reasonably calculated to lull the plaintiff into a sense of security and delay action beyond the statutory period or (b) an express and repeated admission of liability in conjunction with promises of payment, settlement, or performance." *Jarvis v. City of Stillwater,* 732 P.2d 470, 472-73 (Okla. 1987). Plaintiffs allege that Tulsa promised that it would "make good the damage, so far as can be done, to the last penny." SAC, 221.

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[5] Alfred L. Brophy, Assessing State and City Culpability: The Riot and the Law, published with the Commission Report, 153, 166 (2001).

[6] Scott Ellsworth, The Tulsa Race Riot, published with the Commission Report, 37, 86 (2001).

Plaintiffs' reliance on such a promise, however, is not supported by the allegations of the Complaint:

> In the aftermath of the Riot, the State of Oklahoma and the City of Tulsa impeded the Plaintiffs' attempts to rebuild their lives. The City of Tulsa acted quickly to apply zoning restrictions to Greenwood that rendered reconstruction of the destroyed dwellings prohibitively expensive. When the zoning regulations were declared unlawful, Defendant the City of Tulsa refused to provide economic compensation or to help the victims, many of whom remained in tents through the fall and into the winter of 1921. SAC, 21.

The Court does not find that the City's promises of restitution are sufficient to give rise to equitable estoppel.

**3. "Extraordinary Circumstances"**

Equitable tolling is appropriate where extraordinary circumstances outside a person's control prevent him from timely asserting a claim. *Hilao v. Estate of Marcos,* 103 F.3d 767, 773 (9th Cir. 1996). Intimidation and fear of reprisal are extraordinary circumstances that warrant equitable tolling. *Id.* The effective unavailability of the courts system also constitute the type of extraordinary circumstances that would toll the statute of limitations. *Id.* Another court has held that "the brutal reality of the Holocaust, and the resulting extraordinary circumstances that Plaintiffs were forced to endure" meant that "for the majority of Plaintiffs, the years following World War II were particularly difficult" and warranted equitable tolling of the statute of limitations. *Rosner v. United States,* 231 F. Supp. 2d 1202, 1209 (S.D. Fl. 2002).

Plaintiffs assert extraordinary circumstances in a legal system that was openly hostile to them, courts that were practically closed to their claims, a City that blamed them for the Riot and actively suppressed the facts, an era of Klan domination of the courts and police force, and the era of Jim

Crow. There is no question that there are exceptional circumstances here. Both the Commission Report and the Legislative Findings and Intent resulting from that Report catalog the horror and devastation of the Riot as well as the intimidation, misrepresentation and denial that took place afterward. The political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights. The question is not a factual question of whether exceptional circumstances existed. They did. It is a legal question of the effect, with respect to the issue of statute of limitations, of those exceptional circumstances.

When extraordinary circumstances are found, the statute of limitations is tolled until those circumstances no longer exist. *Hilao,* 103 F.3d at 773 (exceptional circumstances created by president's human rights violations toll statute of limitations until that president is no longer in office). Equitable tolling "halts the running of the limitations period so long as the plaintiff uses reasonable case and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct." *In re African-American Slave Descendants Litigation,* ---F. Supp.2d---, 2004 WL 112646, *41 (quoting 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedures § 1056, at 239 (3d ed. 2002)). In the instance of equitable tolling, the obligation is on the Plaintiff to use diligence in bringing suit when it becomes possible. The Court has already determined that Plaintiffs were aware of the necessary facts in the aftermath of the Riot. Other extraordinary circumstances were intimidation, fear of a repeat of the Riot, inequities in the justice system, Klan domination in the courts, and the era of Jim Crow. Plaintiffs' expert, Dr. Leon Litwack testified that the Jim Crow era ended in the 1960's. Further, there is no credible allegation that any of the other exceptional circumstances continued until the Commission Report was published.

**4. State's Promise to follow the Recommendations of the Commission**

Plaintiffs also argue that the State is bound by its promise to follow the recommendations of the Commission. Promissory estoppel requires 1) a clear and unambiguous promise, 2) foreseeability by the promisor that the promisee would rely upon it, 3) reasonable reliance upon the promise to the promisee's detriment and 4) hardship or unfairness that can be avoided only by the promise's enforcement. *Russell v. Board of County Commissioners, Carter County,* 952 P.2d 492, 503. Here Plaintiffs appear to be relying on a 1999 statement by then-Governor Frank Keating and the Commission Report itself. Governor Keating said that "Compensation for direct loss occasioned by direct state or city action is not inappropriate . . . . But is has to be shown that there was real harm to existing, living individuals and that direct action by the city and the state caused the harm." SAC, 219. Such reliance is not reasonable. Only the legislature could authorize reparations. Moreover, nothing in the Commission Report is binding on the legislature, and there is no evidence that the Oklahoma Legislature has promised to pay restitution or reparations to the race riot survivors.

**5. Vindication of Public Interest**

Plaintiffs argue that lawsuits seeking to vindicate the public interest are not time-barred. *Town of Cyril v. Mobil Oil Corp.* 11 F.3d 996, 998 (10th Cir. 1993). Under *Town of Cyril,* "a municipal corporation is entitled to avoid the bar of the statute of limitations if it sues in its "sovereign capacity" in an appropriate case." *Id.*

Plaintiffs assert that "because the City and State have failed to act, Plaintiffs stand in their shoes to fulfill the recommendation of the Tulsa Race Riot Commission and to restore the honor and dignity of the entire community. . . ." Plaintiffs provide no authority for their proposition that, under the holding of *Town of Cyril,* a private Plaintiff would ever be allowed to "stand in the shoes" of a municipal corporation.

Moreover, the Court does not agree with Plaintiffs' assertion that the City and State have failed to act. While Plaintiffs have not received any restitution or reparations, a Commission was established and legislative findings were made.

The Court concludes that Plaintiffs' claims are barred by the Statute of Limitations and that there is no exception or equitable doctrine which would prevent the operation of the Statute of Limitations in this case.

**F. IMMUNITY**

The State argues that Plaintiffs' claims against it are barred by the Eleventh Amendment. Plaintiffs' point out that, under the doctrine of *Ex Parte Young*, 209 U.S. 123, 159-60, (1908) declaratory and injunctive relief is permitted against a state officer sued in his or her official capacity. If the Court construes the Second Amended Complaint as stating a claim against the State instead of the Governor, the Plaintiffs request that they be permitted to amend the complaint to state claims for injunctive and declaratory relief under 42 U.S.C. §§ 1981, 1983, and 1985 against Governor Brad Henry in his official capacity as Governor of the State of Oklahoma. Although amendment would be normally allowed at this relatively early stage of litigation, the Court finds that the request is moot, and amendment would be futile in light of its finding that Plaintiffs' claims are barred by the Statute of Limitations.

**G. SANCTIONS**

Shortly after the hearing on the pending motions, the City filed a Motion for Sanctions (dkt # 124), essentially arguing that filing the Complaint was sanctionable conduct because it should have been apparent that Plaintiffs' claims were barred by the statute of limitations. The issue of the statute of limitations and the potential application of equitable doctrines of estoppel and tolling in this case is very complex and difficult. The Court noted at the end of the hearing:

> I appreciate the presentations and well thought out arguments that have been presented today.

> It is not a simple question. It is not simplistic. There are serious issues of the statute of limitations and there are serious responses to those issues, and I understand that.

There is no valid argument that bringing these claims constitutes sanctionable conduct. In fact the filing of the motion for sanctions is more troubling than the filing of the Complaint. The contentious attitude of Defendants in this case has been destructive and wasteful of judicial resources. Plaintiffs brought serious claims against Defendants, and Defendants should have, and did, defend themselves vigorously against those claims. However, the contentious attitude that led to the filing of a motion for sanctions, in effect belittles the decision to bring this lawsuit, and only fuels the belief that the State and City are ignoring their moral responsibility for the Riot. Such conduct is, indeed, unfortunate particularly in light of the findings of the Legislature based on the Commission Report

**H. CONCLUSION**

The Commission Report is a valuable tool in understanding and documenting the Race Riot of 1921. It also brings needed attention to an extremely tragic event in our City's and our State's history, and, hopefully, will be a tool for healing and uniting communities. Although Plaintiffs urge that it should also be the foundation for the application of equitable doctrines to prevent the barring of claims by the statute of limitations, the Court is unable to find any legal basis for using the Report in this way. There is no comfort or satisfaction in this result, and there should be none to Defendants. That Plaintiffs' claims are barred by the statute of limitations is strictly a legal conclusion, and does not speak to the tragedy of the Riot or the terrible devastation it caused.

The Motion To Dismiss Second Amended Complaint on Behalf of Defendant "State of Oklahoma" (dkt # 59) is MOOT, the Defendant "State of Oklahoma's" Supplemental Motion to Dismiss Second Amended Complaint (dkt # 82) is GRANTED, and the Defendant City of Tulsa's Motion to

Dismiss, Alternative Motion for Summary Judgment (dkt # 92) is GRANTED, The City's Motion to Exclude the Report and Testimony of Dr. Eric D. Caine (dkt # 93) is GRANTED, the City's Application for Leave to File Reply to Plaintiffs Response to Defendant City's Motion to Dismiss and Alternative Motion for Summary Judgment (dkt # 99) is GRANTED, the Defendant State of Oklahoma's Application for Leave to File Reply to Plaintiffs' Response to State of Oklahoma's Motion to Dismiss (dkt # 108) is GRANTED, the City's Motion to Strike Plaintiffs' Supplemental Memo of Law in Opposition to Defendant City of Tulsa's Motion to Dismiss, Alternative Motion for Summary Judgment (dkt # 123) is DENIED, and the City's Motion for Sanctions (dkt # 124) is DENIED.

IT IS SO ORDERED THIS 19TH DAY OF MARCH, 2004.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04-5042

JOHN MELVIN ALEXANDER, et al.,
Plaintiffs-Appellants,

v.

THE STATE OF OKLAHOMA; THE CITY OF TULSA; THE CHIEF OF POLICE OF THE CITY OF TULSA, in his official capacity; THE CITY OF TULSA POLICE DEPARTMENT; DOES 1 thru 100, inclusive,
Defendants-Appellees.

Filed: December 13, 2004

Before TACHA, Chief Circuit Judge, BARRETT, Senior Circuit Judge, SEYMOUR, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, MCCONNELL, and TYMKOVICH, Circuit Judges.

**ORDER**

The appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. A poll was requested and a majority of the active judges voted to deny rehearing en banc. Judges Seymour, Henry, Lucero, and Hartz voted to grant rehearing. Judge Lucero filed a dissent from the denial of rehearing en banc, and he was joined in this dissent by Judge Seymour.

Entered for the Court,
PATRICK FISHER

Clerk of Court

LUCERO, Circuit Judge, dissenting, with whom SEYMOUR, Circuit Judge, joins.

No case in my tenure on the court could be more compellingly described as meeting the Rule 35 en banc standard of presenting a "question of exceptional importance" deserving the attention of the entire court than this. In one of the more shameful events in our nation's history, over two hundred African-Americans were slaughtered and a whole section of the City of Tulsa was burned in an uncontrolled riot in 1921. Official government action by the City of Tulsa and the State of Oklahoma fueled this carnage by deputizing and arming the mob, and authorizing the National Guard to detain the victims while their forty-two square block community was razed to the ground. (It is inconceivable that a government investigation of the incident of September 11 would have failed to count every person who perished, yet telling of the attitude that prevailed in Oklahoma in 1921 is that no effort was made to determine officially the number of those who died there.) All subsequent claims raised by the victims fell upon the deaf ears of the courts at the time, and most languished without even a cursory glance at the merits. None of the over one hundred lawsuits filed were successful. In a perversion of justice, a grand jury commissioned by the state exonerated the city and state, and all white rioters, and blamed the victims for the atrocity. This history alone raises a "question of exceptional importance" - the laudable recent investigation of this tragedy by the State of Oklahoma compels us to confront it.

But exceptional importance alone is not the sole Rule 35 basis which requires en banc review. Victims of the Riot, who were children at the time of the incident, and descendants of

victims constitute the plaintiffs in this case. They seek equitable tolling of the statute of limitations. The trial court abused its discretion by dismissing the plaintiffs' complaint to the prejudice of a jury determination, in that it correctly concluded that the plaintiffs had been deprived of an impartial forum adequate to vindicate their rights, while incorrectly finding that equitable tolling had lifted at some unspecified point in the past.[1] The trial court answered the wrong question by asking whether the exceptional circumstances had changed. Rather, it should have asked whether the plaintiffs had pled a sufficient evidentiary basis - construed in the light most favorable to them - to raise a question of fact for resolution by a jury about whether the exceptional circumstances persisted.

For the reasons I state below it is my considered judgment that en banc review of this case is warranted, and I therefore respectfully dissent from the court's denial of en banc review.

**Background**

In 1997 the Oklahoma legislature originated the 1921 Tulsa Race Riot Commission in order to examine officially the circumstances surrounding the Riot and its after-effects and to make recommendations to the governor and the state legislature. In its "Final Report," published on February 28, 2001, the Commission outlined the evidence it developed, which included:

> records and papers long presumed lost, if their existence had been known at all. Some were official documents, pulled together and packed away years earlier. Uncovered and examined, they took the commission back in time, back to the years just before and just after 1921. Some were musty legal records saved from the shredders. Briefs filed, dockets set, law suits

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[1] We review a district court's application of equitable tolling principles for abuse of discretion. *Garrett v. Fleming*, 362 F.3d 692, 695 (10th Cir. 2004).

> decided - each opened an avenue into another corner of history. Pages after pages laid open the city commission's deliberations and decisions as they affected the Greenwood area. "Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921" ("Report") at 4.

These reports led the Commission to state that "what happened in Tulsa stays as important and remains as unresolved today as in 1921. What happened there still exerts its power over people who never lived in Tulsa at all," *id.*, and that the "commission's work and the documentary record it leaves behind shines upon [the Riot] a light too bright to ignore." *Id.* at 6. In describing the attitudes that prevailed at the time, the Commission concluded:

> The intent was to intimidate one community . . . . These are the qualities that place what happened in Tulsa outside the realm of the law - and not just in Tulsa, either. Lexington, Sapulpa, Norman, Shawnee, Lawton, Claremore, Perry; Waurika, Dewey, and Marshall - earlier purges in every one had targeted entire black communities, marking every child, woman, and man for exile. . . . [A] collective body - acting as one body - had coldly and deliberately and systematically assaulted one victim, a whole community, intending to eliminate it as a community. If other black communities heard about it and learned their lessons, too, so much the better; a little intimidation went a long way. . . . Here were discrete acts - one act, one town - each consciously calculated to have a collective effect not against a person but against a people. . . . The one purpose was to keep one race "in its place." *Id.* at 16-17.

The Commission asked:

> Who sent the message? Not one person but many acting as one. Not a "mob;" it took forms too calculated and rational for that word. . . . It really was not "Oklahoma" either. At least, it was not all of Oklahoma. It was just one Oklahoma, one Oklahoma that is distinguishable from another Oklahoma partly by purpose. This Oklahoma had the purpose of keeping the other Oklahoma in its place, and that place was subordinate. That, after all, was the object of suffrage requirements and segregation laws. No less was it the intent behind riots and lynchings, too. One Oklahoma was putting the other Oklahoma in its place. . . . Government was never the essence of that Oklahoma. Government was, however, always its potential instrument. Having access to government, however employed, if employed at all - just having it - defined this Oklahoma and was the essence of its power. *Id.* at 19.

In describing the various assaults on the African-American community, and in a resounding denunciation of the system that prevailed in the aftermath of the Riot, the Commission stated "in some government participated in the deed. In some government performed the deed. In none did government prevent the deed. In none did government punish the deed." *Id.*

**Equitable Tolling of the Statute of Limitations**

This case is not about tolling, it is about equitable tolling. Plaintiffs sued the State of Oklahoma, the City of Tulsa, and others under, inter alia, §§ 1981, 1983, and 1985 for damages they sustained in the Riot. Rejecting their equitable tolling arguments, the district court dismissed the plaintiffs' suit on statute of limitations grounds. The panel affirmed.

On the basis of the overwhelming force of the Commission's report, the panel correctly concluded that at the

time of the Riot the victims were denied meaningful ability to gain restitution in the courts. Nonetheless, the panel affirmed the district court's finding that at some unspecified point, prior to February 2001, the extraordinary circumstances that justified equitable tolling the statute of limitations had abated. This is the error upon which I dissent.

We have previously concluded that exceptional circumstances may justify equitable tolling of a statute of limitations. *See, e.g., Van Tu v. Koster*, 364 F.3d 1196, 1199-1200 (10th Cir. 2004). Generally, courts have tolled the statute of limitation when plaintiffs' failure to file their claims within the statutory period is excused by the defendant's misconduct. *See Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (holding that fear of reprisal was extraordinary circumstance justifying equitable tolling on Philippine nationals' claims against the Estate of Fedinand Marcos for injuries arising from torture and summary execution); *Hobson v. Wilson*, 737 F.2d 1, 37 (D.C. Cir. 1984) (tolling statute because the FBI's concealment of its COINTELPRO activities blinded plaintiffs to their potential cause of action); *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (taking as true plaintiffs' allegations that the United States wrongfully claimed that property it seized from the Nazis taken from Hungarian Jews was unidentifiable and unreturnable, the court equitably tolled the statute); *Thompson v. Metropolitan Life Ins. Co.*, 149 F. Supp. 2d 38 (S.D.N.Y. 2001) (tolling statute on African-American plaintiffs claims against defendant insurance companies for pattern of intentional discrimination in sales of insurance policies from the late 1800s through the 1970s); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 136 (E.D.N.Y. 2000) (finding on claims by Jewish plaintiffs against various banks seeking restitution of money and property that "there is no reason that plaintiffs should be denied a forum for addressing their claims as a result of deceitful practices by the defendants which have kept them from knowing or proving the extent of these claims").

In the matter before us, plaintiffs argue that a combination of at least four factors summarized as follows warrant equitable tolling: (1) an openly hostile racial environment, (2) denial of responsibility by governmental officials, (3) the grand jury's exoneration of white rioters, and (4) the grand jury's indictment of African-American victims. Concluding that the openly hostile racial environment substantially changed well before February 2001, the district court found that exceptional circumstances did not support tolling the statute of limitations to that date. On appeal, the panel endorsed the court's reasoning and affirmed. Both the district court and the panel erroneously disregarded the other three grounds alleged by the plaintiffs as constituting, in combination, exceptional circumstances. Each of those grounds clearly persisted until the filing of the Commission Report.

Our decision in *Van Tu* implies that on a motion to dismiss based on the statute of limitations, the district court must determine with reference to the facts before it, construed in the light most favorable to the plaintiffs, whether the exceptional circumstances justifying the tolling of the statute of limitations persisted long enough to render the complaint timely filed. Of course, if there is a dispute of facts on the point, such fact determinations should be made by a jury, not by the court or the panel. *Redwine v. Baptist Med. Ctr of Okla., Inc.*, 679 P.2d 1293, 1295 (Okla. 1983) ("the beginning of the running of the statute of limitations is usually to be determined from the facts and circumstances of the particular case; and, where these are such that reasonable men might reach conflicting opinions thereon, the issue is a question for determination by the trier of the facts"). The Report, which was before the district court, amply demonstrates that issues of material fact exist as to whether at least three circumstances alleged by the plaintiffs persisted until February 2001, namely the denial of responsibility by the government, the grand jury's exculpation of the white rioters, and the grand jury's indictment of the Riot's victims. These

factors, taken in combination, constitute exceptional circumstances because any attempt the victims could have made to seek restitution prior to the Report would necessarily have occurred in the shadow of numerous official pronouncements denying culpability. Only after the Commission issued the Report revealing the government's responsibility and exonerating the African-American community did the context change and allow the victims a fair opportunity to seek justice.

However, the panel suggests that publication of Scott Ellsworth's book, Death in a Promised Land, in the early 1980s, which contained some of the facts included in the Commission's Report, at the very latest, would have stopped the equitable tolling. This argument misconstrues the heart of plaintiffs' claim. Plaintiffs do not argue that they were unaware of the facts, their claim is that the continued renunciation of government culpability by those in power created an impenetrable barrier to justice. In any event, whether the 1982 publication trumps an equitable claim is properly a question for a fact finder.

Finding "extraordinary circumstances in a legal system that was openly hostile to [the plaintiffs], courts that were practically closed to their claims, a City that blamed them for the Riot and actively suppressed the facts, an era of Klan domination of the courts and police force, and the era of Jim Crow," the district court determined that "there is no question that there are exceptional circumstances here" sufficient to conclude that "the political and social climate after the riot simply was not one wherein the Plaintiffs had a true opportunity to pursue their legal rights." *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131, *30-31 (N.D. Okla. 2004). Notably, the district court summarily concluded that "there is no credible allegation that any of [these] exceptional circumstances continued until the Commission Report was published." 2003 U.S. Dist. LEXIS 5131 at *32. This conclusion flies in the face of the Oklahoma state legislature's finding that the Tulsa Race Riot "was

virtually forgotten," but "The 1921 Tulsa Race Riot Commission has forever ended the 'conspiracy of silence' surrounding the events in Tulsa of May 31-June 1, 1921, and their aftermath." Okla. Stat. tit. 74, § 8000.1. In adopting the Commission's Report, the state legislature for the first time "freely acknowledged its moral responsibility on behalf of the state of Oklahoma and its citizens" for subordinating African-Americans. Id. The legislature also pronounced that "official reports and accounts of the time that viewed the Tulsa Race Riot as a 'Negro uprising' were incorrect." *Id.*

Given the plaintiffs' allegations that the poisonous atmosphere created by the *official* denials of government culpability and *official* pronouncements that the African-American community was to blame would have fatally tainted any lawsuit, and that the Commission Report constituted the first and only *official* reversal of those positions, the district court abused its discretion by so tersely disregarding the plaintiffs' arguments. Rather, the court should have viewed the evidence in the light most favorable to the plaintiffs and submitted to a jury the question of whether the exceptional circumstances persisted until publication of the Report. Compounding this error, the panel affirmed the district court's finding by concluding that "evidence suggesting the City and State's involvement in the Riot was available in its immediate aftermath and, at the very least, upon publication of Death In A Promised Land in 1982." *Alexander v. Oklahoma*, 382 F.3d 1206, 1219 (10th Cir. 2004). Stating that facts were available demonstrating government culpability does not respond to the plaintiffs' argument that denial of responsibility by governmental officials, the grand jury's exoneration of white rioters, and the grand jury's indictment of African-American victims created an official barrier to justice, which constitutes an extraordinary circumstance that persisted until the Commission filed its report.

Given the district court's indefiniteness regarding when equitable tolling was no longer appropriate, I suspect that there is no time when social conditions would have been

different for the plaintiffs - no time when, on the court's reasoning, they could have brought their claim. That is, the court could always point to some earlier time when plaintiffs should have brought their claims - e.g., the naming of the Commission, the publication of Ellsworth's book, the passage of civil rights legislation, the decision in *Brown v. Board of Education* - all the way back in time until the racist conditions underlying the claim for equitable tolling would have foreclosed any such claims. Our equitable duties require more from us than to place plaintiffs in such an untenable position.

Furthermore, with regard to plaintiffs' claims of equitable tolling on the basis of fraudulent concealment, the district court and the panel both correctly note that in Oklahoma the statute is tolled when a defendant commits "some actual artifice to prevent knowledge or some affirmative act of concealment or some misrepresentation to exclude suspicion and prevent inquiry." *Wills v. Black & West, Architects*, 344 P.2d 581, 584 (Okla. 1959); *Jarvis v. City of Stillwater*, 732 P.2d 470, 472-73 (Okla. 1987). Recognizing that both a discovery rule and the doctrine of fraudulent concealment are exceptions to the running of a statute of limitations, the district court and the panel focus only on the issue of what information plaintiffs reasonably had available prior to 2001, essentially focusing only on the discovery rule that tolls the limitations period "until an injured party knows of, or in the exercise of reasonable diligence, should have known of or discovered the injury." *Lovelace v. Keohane*, 831 P.2d 624, 629 (Okla. 1992).

Although it is certain that the plaintiffs were aware of their injuries from the date they occurred, it is also equally certain that the city and state concealed their role in the Riot, as the district court correctly observes, "through the convening of a Grand Jury that blamed the Riot on the victims, the failure to investigate the riot or prosecute persons who committed murder or arson, and the disappearance of official files from the Oklahoma National Guard, the County

Sheriff, and the Tulsa Police Department." *Alexander v. Oklahoma*, 2004 U.S. Dist. LEXIS 5131, at *23. The panel nonetheless affirmed the district court's finding that the defendants' concealment did not bar plaintiffs' ability to discover "essential information" about their claims. But this finding bypasses the plaintiffs' argument that the fact of admission of responsibility and the fact of renunciation of the grand jury findings were not present until 2001. Even if under Oklahoma law, "one relying on fraudulent concealment to toll the statute of limitation must not only show that he did not know facts constituting a cause of action, but that he exercised reasonable diligence to ascertain such facts," *Funnell v. Jones*, 737 P.2d 105, 107 (Okla. 1985), when the state has fraudulently concealed key facts pertaining to responsibility, no amount of diligence could have uncovered the key fact of the government's own admission of responsibility.

In light of the government's official concealment, I find the following discussion of our equitable duty compelling as "a sound and philosophical view of the principles of the statutes of limitation." *Bailey v. Glover*, 88 U.S. 342 (1875).

> They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. *Id.*

We may, in our discretion, when confronted by questions of equity, decide on the application of equitable tolling within the broad valley of doing justice, not the narrow canyon of legal rule. Under the circumstances of this case, no inquiry could have discovered the critical facts of the state's own admission of responsibility, and therefore inquiry was precluded until the publication of the Report in 2001. Because "equity eschews mechanical rules" and requires us to exercise flexibility, "equity will not lend itself to such fraud and historically has relieved from it." *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *see also*, *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001). Fraudulent concealment, like an assertion of exceptional circumstances, constitutes a method of establishing equitable tolling, and the question of whether the Oklahoma governments engaged in fraudulent concealment should have gone to the jury. *See, e.g.*, *Hobson*, 737 F.2d at 37. Accordingly, the panel inadequately addressed the issue of whether fraudulent concealment forecloses defendants' time bar defense.

It would be a perversion of equity at this stage to reward concealment recognized by the Oklahoma Legislature as "a 'conspiracy of silence' [that] served the dominant interests of the state," Okla. Stat. tit. 74, § 8000.1, merely because the plaintiffs were all too aware of the general cause of their injury, even though the details remained hidden and unacknowledged. I would not so easily conclude, as does the panel, that merely because plaintiffs were able to file over one hundred lawsuits in the aftermath of the atrocity (all of which were frustrated by courts' complicity in the concealment), that the city and state should be given the benefit of their concealment and allowed to raise the defense of the statute of limitations. This is particularly so in view of the district court's, and the panel's own, determination that the original lawsuits were fruitless. Indeed, Scott Ellsworth's The Tulsa Race Riot, attached to the Report, ends with the following: "In the 1920's Oklahoma courtrooms and halls of government, there would be no day of reckoning for either the

perpetrators or the victims of the Tulsa race riot. Now, some seventy-nine years later, the aged riot survivors can only wonder if, indeed, that day will ever come." "Report" at 89. That wonder is over, and I am sad to say that before our court, that day will never come.

In summary, plaintiffs seek the one thing they could not get in 1921: a court to hear their claims free of official denial of culpability. Because the governments officially denied their guilt for the Riot and instead employed their judicial powers officially to condemn the African-American community for the tragedy, the district court properly concluded that equity demands tolling the statute of limitations. The district court's dismissal of plaintiffs' claim that those exceptional circumstances merited tolling the statute until the publication of the Commission Report should be revisited. Because the panel erred by affirming that conclusion and by applying an inappropriate legal standard to decide plaintiffs' fraudulent concealment claims, this matter deserves en banc consideration.

Accordingly, I DISSENT from the court's denial of en banc review. I am authorized to state that Judge Seymour joins me in this dissent.

## STATUTES

The "1921 Tulsa Race Riot Reconciliation Act of 2001" provides in relevant part:

SECTION 2. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 8000.1 of Title 74, unless there is created a duplication in numbering, reads as follows:

The Oklahoma Legislature hereby finds, pursuant to the final report of The 1921 Tulsa Race Riot Commission regarding the 1921 Tulsa Race Riot of May 31-June 1, 1921, and the riots place in the history of race relations in Oklahoma:

1. The root causes of the Tulsa Race Riot reside deep in the history of race relations in Oklahoma and Tulsa which included the enactment of Jim Crow laws, acts of racial violence (not the least of which was the 23 lynchings of African-Americans versus only one white from 1911) against African-Americans in Oklahoma, and other actions that had the effect of "putting African-Americans in Oklahoma in their place" and to prove to African-Americans that the forces supportive of segregation possessed the power to "push down, push out, and push under" African-Americans in Oklahoma;
2. Official reports and accounts of the time that viewed the Tulsa Race Riot as a "Negro uprising" were incorrect. Given the history of racial violence against African-Americans in Oklahoma, including numerous lynchings by white mobs, and the breakdown of the rule of law in Tulsa on May 31-June 1, 1921, it is understandable that African-Americans believe they needed to assist Tulsa police in protecting Dick Rowland, an African-American accused of attempting to rape a white woman, against an assembled white mob. The documentation assembled by The 1921 Tulsa Race Riot Commission provides strong evidence that some local municipal and county officials failed to take actions to calm or contain the situation once violence erupted and, in some cases,

became participants in the subsequent violence which took place on May 31 and June 1, 1921, and even deputized and armed many whites who were part of a mob that killed, looted, and burned down the Greenwood area.

3. The staggering cost of the Tulsa Race Riot included the deaths of an estimated 100 to 300 persons, the vast majority of whom were African-Americans, the destruction of 1,256 homes, virtually every school, church and business, and a library and hospital in the Greenwood area, and the loss of personal property caused by rampant looting by white rioters. The Tulsa Race Riot Commission estimates that the property costs in the Greenwood district was approximately $2 million in 1921 dollars or $16,752,600 in 1999 dollars. Nevertheless, there were no convictions for any of the violent acts against African-Americans or any insurance payments to African-American property owners who lost their homes or personal property as a result of the Tulsa Race Riot. Moreover, local officials attempted to block the rebuilding of the Greenwood community by amending the Tulsa building code to require the use of fire-proof material in rebuilding the area thereby making the costs prohibitively expensive;
4. Perhaps the most repugnant fact regarding the history of the 1921 Tulsa Race Riot is that it was virtually forgotten, with the notable exception of those who witnessed it on both sides, for seventy-five (75) years. This "conspiracy of silence" served the dominant interests of the state during that period which found the riot a "public relations nightmare" that was "best to be forgotten, something to be swept well beneath historys carpet" for a community which attempted to attract new businesses and settlers;
5. The work of many individual Oklahomans and now of The 1921 Tulsa Race Riot Commission has forever ended the "conspiracy of silence" surrounding the

events in Tulsa of May 31-June 1, 1921, and their aftermath. The Commission has subsequently turned the responsibility for how the State of Oklahoma will respond to the historical record to the 48th Oklahoma Legislature; and

6. The 48th Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 concurs with the conclusion of The 1921 Tulsa Race Riot Commission that the reason for responding in the manner provided by this act is not primarily based on the present strictly legal culpability of the State of Oklahoma or its citizens. Instead, this response recognizes that there were moral responsibilities at the time of the riot which were ignored and has been ignored ever since rather than confront the realities of an Oklahoma history of race relations that allowed one race to "put down" another race. Therefore, it is the intention of the Oklahoma Legislature in enacting the 1921 Tulsa Race Riot Reconciliation Act of 2001 to freely acknowledge its moral responsibility on behalf of the state of Oklahoma and its citizens that no race of citizens in Oklahoma has the right or power to subordinate another race today or ever again.